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ODAK, JR.

In The

Supreme Court of the United States

No. 72-366

VILLAGE OF WALTHILL, Nebraska, a municipal corporation; GEORGE YOUNG; HON. LIDA HINKLE; LAWRENCE JEPSEN; GEORGE SCHEIDT; H. W. CULWELL; BEN KRAUSE; RAYMOND L. WINGETT; RALPH GRAY; EDWARD DONLIN; HON. BETTY J. BRONDUM; and CLYDE STORIE; THURSTON COUNTY, NEBRASKA and the STATE OF NEBRASKA,

Petitioners,

vs.

OMAHA TRIBE OF NEBRASKA, a corporation, the TRIBAL COUNCIL of the Omaha Tribe of Nebraska; the MEMBERSHIP of the Omaha Tribe of Nebraska; EDWARD L. CLINE; LEONARD SPRINGER; CLEMENT MITCHELL; LAWRENCE COOK; VICTOR ROBINSON; VALENTINE PARKER, SR.; and WAYNE TYNDALL,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CLARENCE A. H. MEYER,
Attorney General of Nebraska
MELVIN KENT KAMMERLOHR,
Assistant Attorney General of Nebraska
Room 2119, State Capitol Building
Lincoln, Nebraska 68509
ROBERT G. SCOVILLE,
Attorney
Box 155, South Sioux City, Nebraska 68776
RONALD K. SAMUELSON,
Attorney
Pender, Nebraska 68047
Attorneys for Petitioners.

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

INDEX

Subject Index

	Pages
Petition for Wrie of Certiorari	1
Opinions Below	1
Grounds for Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	9
Reasons for Allowing the Writ	11
Conclusion	15
Appendix 1	17
Appendix 2	20
Appendix 3	57
Appendix 4	62
Appendix 5	80
Appendix 6	92

CASES CITED

Johnson v. Virginia, 373 U. S. 61, 10 L. Ed. 2d 195, 83 S. Ct. 1053	14
State v. Goham, 187 Neb. 35, — N. W. 2d —	13
State v. Tyndall, 187 Neb. 48, — N. W. 2d —	13
United States v. Brown, 334 F. Supp. 536	13

STATUTES AND CONSTITUTIONAL PROVISIONS CITED

	Pages
18 U. S. C. § 545	11
18 U. S. C. § 1162	3, 8, 10, 14, 15
22 U. S. Statutes at Large 341, August 7, 1882	9, 15
25 U. S. C. § 1323	3, 4, 10, 11, 13
28 U. S. C. § 1254(1)	2
28 U. S. C. § 1362	10
Executive Order 11435, Nov. 21, 1968 (33 F. R. 17339)	3
Legislative Resolution 37, Eightieth Session of the Nebraska Legislature	4, 10, 15
Legislative Resolution 16, Eighty-Second Session of the Nebraska Legislature	6
United States Constitution, Article I, Section 1	7
United States Constitution, Article IV, Section 2	7
United States Constitution, Amendment XIV, Section 1	8

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PETITION FOR WRIT OF CERTIORARI

Your petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on June 5, 1972.

OPINIONS BELOW

The opinion of the United States Court of Appeals is not yet reported. A copy of such opinion is separately attached hereto in Appendix No. 1.

The opinion of the United States District Court for the District of Nebraska which was affirmed by the United States Court of Appeals for the Eighth Circuit is reported in 334 F. Supp. 823, issued November 23, 1971, copy of which is attached hereto in Appendix No. 2.

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Eighth Circuit on June 5, 1972. Appendix 1. This judgment affirmed the judgment of the United States District Court for the District of Nebraska entered November 23, 1971, Appendix 2.

Because of the extreme urgency of the need for a controlling opinion no rehearing was sought.

The statutory provision believed to confer on the United States Supreme Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Where a state is authorized under a federal statute to retrocede all or any part of certain jurisdiction previously granted to it from the federal government and the United States is authorized to accept such retrocession

and the state determines what part of said previously acquired jurisdiction it is willing to retrocede and does retrocede such part may the United States then accept less jurisdiction than what was offered or must it accept the entire offer or reject the entire offer of retrocession?

2. May a state constitutionally deny access to the state courts and the jurisdiction of its criminal laws to persons within its boundaries simply because of race?

3. Did the State of Nebraska acquire criminal jurisdiction over the Omaha Indian Reservation prior to the grant by the federal government on August 15, 1953 (Public Law 280, 1967 Statutes 588, 18 U. S. C. § 1162)?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) 25 U. S. C. § 1323(a):

> "The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section."

(2) Executive Order No. 11435, November 21, 1968 (33 F. R. 17339):

> "Designating the Secretary of the Interior to Accept on Behalf of the United States retrocession by any State of Certain Criminal and Civil Jurisdiction Over Indian Country
>
> "By virtue of the authority vested in me by section 465 of the Revised Statutes (25 U. S. C. 9) and

as President of the United States, the Secretary of the Interior is hereby designated and empowered to exercise, without the approval, ratification, or other action of the President or of any other officer of the United States, any and all authority conferred upon the United States by section 403(a) of the Act of April 11, 1968, 82 Stat. 79 (25 U.S.C. 1323(a)): *Provided,* That acceptance of retrocession of all or any measure of civil or criminal jurisdiction, or both, by the Secretary hereunder shall be effected by publication in the FEDERAL REGISTER of a notice which shall specify the jurisdiction retroceded and the effective date of the retrocession: *Provided further,* That acceptance of such retrocession of criminal jurisdiction shall be effected only after consultation by the Secretary with the Attorney General."

(3) Legislative Resolution 37, Eighteith Session of Nebraska Legislature:

"*Whereas,* the State of Nebraska was given civil and criminal jurisdiction over Indians and Indian territory in this state by the Act of Congress of August 15, 1953, generally known as Public Law 280; and

"*Whereas,* the assumption of such jurisdiction has led to steadily increasing costs for law enforcement in certain counties of Nebraska, and particularly in Thurston County; and

"*Whereas,* because of restrictions in original grants of land in Thurston County to Indians and Indian tribes, Thurston County has not had a sufficient tax base to meet the increasing costs of law enforcement; and

"*Whereas,* since 1957, state assistance has been provided for law enforcement purposes in Thurston County, and the cost of this assistance has increased each biennium; and

"*Whereas,* Public Law 90-284, adopted as an Act of Congress on April 11, 1968, contains a number of provisions dealing with civil rights and jurisdiction of Indians; and

"*Whereas,* Section 4022(a) of Public Law 90-284 provides that the United States is authorized to accept a retrocession of all or any measure of the jurisdiction acquired by a state pursuant to Public Law 280 of 1953; and

"*Whereas,* a committee of members of the Legislature appointed by the Executive Board of the Legislative Council following adoption of Public Law 90-284 has studied the problems of law enforcement in Indian areas of this state and the question of a retrocession of jurisdiction, and has met with leaders of the Omaha and Winnebago tribes, county officials, and officials of the Bureau of Indian Affairs.

"*Now, therefore, be it resolved by the members of the Nebraska Legislature in Eightieth Session assembled:*

"1. That the State of Nebraska hereby retrocedes to the United States all jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska, acquired by the State of Nebraska pursuant to Public Law 280 of 1953, except as provided in paragraph 2 of this resolution.

"2. That the retrocession of jurisdiction contained in paragraph 1 of this resolution shall not apply to any offenses involving the operation of motor vehicles on public roads or highways.

"3. That the Executive Board of the Legislative Council is hereby authorized and directed to take all necessary action to put this resolution into effect, such action to include arrangements with the Department of the Interior and the department's

Bureau of Indian Affairs concerning the assumption of law enforcement responsibilities in the areas of Indian country covered by this resolution.

"I, Hugo F. Srb, hereby certify that the foregoing is a true and correct copy of Legislative Resolution 37, which was passed by the Legislature of Nebraska in Eightieth regular session on the sixteenth day of April, 1969.

/s/ Hugo F. Srb,
Clerk of the Legislature"

(Nebraska Legislative Journal, Eightieth Session, 1969, page 1467.)

(4) Legislative Resolution 16, Eighty-Second Session of Nebraska Legislature:

"*Whereas,* the Eightieth Session of the Nebraska State Legislature, 1969, adopted Legislative Resolution 37, relating to the retrocession to the United States of jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska, acquired by the State of Nebraska pursuant to Public Law 280 of 1953; and

"*Whereas,* the United States has not accepted retrocession in accordance with the terms and provisions of said Legislative Resolution 37.

"Now, therefore, be it resolved by the members of the Eighty-Second Legislature of Nebraska, First Session:

"1. That the action of the Eightieth Session of the Nebraska State Legislature, 1969, approving Legislative Resolution 37 is rescinded, and the offer of retrocession therein contained is withdrawn.

"2. That a duly attested copy of this resolution be transmitted by the Clerk of the Legislature to the

Secretary of Interior of the United States.

/s/ Frank Marsh,

President of the Legislature

"I, Vincent D. Brown, hereby certify that the foregoing is a true and correct copy of Legislative Resolution 16, which was passed by the Legislature of Nebraska in Eighty-Second Legislature, First Session, on the first day of February, 1971.

/s/ Vincent D. Brown

Clerk of the Legislature

(Nebraska Legislative Journal, Eighty-Second Session, 1971, p. 274.)

(5) Article I, Section 1, United States Constitution:

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

(6) Article IV, Section 2, United States Constitution:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

"A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

"No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequense of any Law or Regulation therein, be discharged from such Service or Labour,

but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

(7) Amendment XIV, Section 1, United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(8) 18 U.S.C. § 1162:

"(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the Territory
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section. Added Aug. 15, 1953, c. 505, § 2, 67 Stat. 588, and amended Aug. 24, 1954, c. 910, § 1, 68 Stat. 795; Aug. 8, 1958, Pub. L. 85-615, § 1, 72 Stat. 545."

(9) 22 U. S. Statutes at Large 341, August 7, 1882 (see Appendix 3).

STATEMENT OF THE CASE

This is an action for a declaratory judgment and an injunction brought by the United States Attorney for the District of Nebraska on behalf of the Omaha Tribe of Nebraska, its Tribal Council and the membership thereof against the Village of Walthill, Nebraska, members of the County Board of Thurston County, Nebraska, the County Judge and County Sheriff of Thurston County, Nebraska,

and the State of Nebraska. The action was brought to determine the rights and duties of the parties and particularly the jurisdiction over crimes committed by or against Indians within the boundaries of the Omaha Indian Reservation in Thurston County, Nebraska, as a result of Legislative Resolution No. 37, 80th Session, Legislature of Nebraska, purporting to retrocede to the federal government the jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska, acquired by the State of Nebraska pursuant to Public Law 280 of 1953 except certain motor vehicle violations and the Notice of Acceptance of Retrocession by the Secretary of Interior.

The government claims jurisdiction under Title 28 U. S. C. § 1362, being a civil action by an Indian tribe with a governing body recognized by the Secretary of the Interior where in the matter in controversy arises under the laws and treaties of the United States including Title 25 U. S. C. § 1323, Title 18 U. S. C. § 1162, and that the matter in controversy exceeds in value the sum of $10,000.

Legislative Resolutions No. 37, Eightieth Session of the Legislature of Nebraska, and No. 16, Eighty-Second Session of the Legislature of Nebraska, and the notice of acceptance of retrocession by the Secretary of the Interior were admitted in evidence by stipulation.

The petitioners claim that said purported retrocession was invalid for the reason that said Legislative Resolution No. 37 of the Nebraska Legislature offered criminal jurisdiction over all Indian territory in Thurston County,

Nebraska, which included both the Omaha Indian Reservation and the Winnebago Indian Reservation but that the Secretary of Interior accepted only the jurisdiction over the Omaha Indian Reservation which was contrary to his authority and the authority of the United States as granted by 25 U. S. C. § 1323. The defendants further claim that the Legislature by Legislative Resolution No. 16 has now withdrawn the offer of retrocession.

The petitioners, by stipulation of the parties and exhibits evidenced cases in which both Omaha and Winnebago Indians were defendants including crimes covered in § 545, Title 18 U. S. C., had been tried in the District Court of Thurston County, Nebraska, for a number of years before 1953.

On application of petitioners a stay of the judgment of the U. S. Court of Appeals was entered pending petition to this court and its decision thereon.

REASONS FOR ALLOWING THE WRIT

1. The U. S. Court of Appeals in this declaratory judgment action has decided the issue of the validity of the retrocession in direct conflict with two previous decisions rendered by the Supreme Court of Nebraska on direct appeal by two Omaha Indians from state court felony convictions after the purported retrocession.

Thus confusion reigns. Local law enforcement officers and prosecutors, pledged to enforce the Constitu-

tion and laws of the State of Nebraska, feel bound to follow the decisions of the Supreme Court of Nebraska. Conversely, federal law enforcement officers and Indian tribal officers feel they must enforce the federal laws and that there is no longer any state criminal jurisdiction on said Omaha Indian Reservation.

No one knows which convictions are valid and which may be overturned in the future. Since said purported retrocession there have been serious felony convictions in both the state and federal courts. The Supreme Court of Nebraska decision alluded to above, involved two Omaha Indians convicted of the forceable rape of a non-Indian woman while passing through said reservation. They were convicted in the District Court of Thurston County, Nebraska—a state court—and appealed to the Supreme Court of Nebraska. On direct appeal they claimed the retrocession of criminal jurisdiction to the federal government was valid and they therefore could not be tried and convicted in a state court. The Supreme Court of Nebraska noted that the Nebraska Legislature had by its resolution attempted to retrocede all criminal jurisdiction over all the Indian territory in Thurston County, Nebraska, that said County contained both the Winnebago Indian Reservation and the Omaha Indian Reservation but that despite this the acceptance of the Secretary of the Interior ran only to the Omaha Indian Reservation. The Court then noted that, "The difficulties apparent in trying to exercise jurisdiction in only a part of the Indian territory in Thurston County, which includes both Winnebago and Omaha Indians, are so patent as not to need elaboration." The Court then held,

"The measure of jurisdiction to be retroceded was a matter for the state to determine and is not dictated in any way by the federal act. The attempted acceptance was not in accordance with the terms of the offer, and was therefore of no force and effect." *State v. Goham,* Supreme Court of Nebraska filed May 28, 1971, 187 Neb. 35, 187 N. W. 2d 305, Appendix No. 4. The Supreme Court of Nebraska held, without elaboration, to the same effect in the companion case of *State v. Tyndall,* filed May 28, 1971, 187 Neb. 48, 187 N. W. 2d 298.

On May 26, 1972, while the present case was pending in the United States Court of Appeals for the Eighth Circuit, the Honorable Warren K. Urbom, Chief Judge, United States District Court for the District of Nebraska, noting the decision of the U. S. District Court in the present case, ordered both the above-mentioned Omaha Indians, Goham and Tyndall, released from state confinement. See Appendix No. 5. The orders releasing Goham and Tyndall are presently pending on appeal to the United States Court of Appeals for the Eighth Circuit.

Conversely, in *U. S. v. Brown,* 334 F. Supp. 536, U. S. District Court of the District of Nebraska, November 29, 1971, the Court held that the felony conviction in *federal* court of an Omaha Indian after said purported retrocession was valid because the retrocession was valid. The issue arose on motion of the defendant to dismiss the criminal action on the ground that the federal government was without jurisdiction. See Appendix 6.

The plain wording of the federal statute authorizing the retrocession, 25 U. S. C. § 1323(a), *supra,* is clear and

unambiguous. It states, "The United States is authorized to accept a retrocession *by any state* of all or any measure of the criminal or civil jurisdiction, or both, acquired by *such state* pursuant to the provisions of § 1162 of Title 18, § 1360 of Title 28 or § 7 of the act of August 15, 1953 * * *." It does *not* state, as the federal courts have thus far interpreted it, "The United States is authorized to accept *all or any measure of* a retrocession by any state of the criminal or civil jurisdiction, or both, acquired by such state * * *." Clearly, Congress could have transposed the words "all or any measure of" to appear after the word "accept" as has been done above if this had been its intention. It did not do so and the United States has exceeded the authority granted it by Congress by accepting less than what the state offered it.

2. The whole concept of retrocession—that a state may cast off all of its civil and criminal jurisdiction as to one group of its citizens and thereby deny to that group access to the courts and the protection of the criminal laws of the state while offering it to all other groups—is completely contrary in this present day to all concepts of equal justice and civil rights as exemplified by the opinions of this court for the last ten years. To conclude that a state may not constitutionally require a Negro to sit in a certain part of the state courtroom (*Johnson v. Virginia*, 373 U. S. 61, 10 L. Ed. 2d 195, 83 S. Ct. 1053) but that an Indian may be completely barred therefrom is utterly ridiculous. To hang the distinction on the origin of the races is also ridiculous. How far back are we going to go?

3. The only jurisdiction attempted to be retroceded by Nebraska Legislative Resolution No. 37 of 1969, of course, was that acquired by the state pursuant to Public Law 280 above (18 U. S. C., Section 1162). However, as evidenced by the record herein, Nebraska has exercised criminal jurisdiction over both felonies and misdemeanors including those covered by the so-called Federal Major Crimes Statute, 18 U. S. C. § 1153 and its predecessors, long before the year 1953. Section 7 of the Act of Congress passed August 7, 1882, 22 U. S. Statutes at Large 341, dealing with the Omaha Indian Reservation, provides:

> "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska; and said State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law." (22 U. S. Statutes at Large 341 is set forth at Appendix No. 2.)

Thus even if said retrocession is held to be valid the state has retained concurrent jurisdiction with the federal government and the criminal convictions since said retrocession by the state courts are nevertheless valid.

CONCLUSION

Petitioners respectfully pray that this court will grant certiorari and resolve this conflict whether the federal

government has exclusive criminal jurisdiction over the Omaha Indian Reservation, as the lower federal courts have said, or whether the State of Nebraska has exclusive criminal jurisdiction as the Supreme Court of Nebraska has said, or whether there now exists concurrent criminal jurisdiction.

Respectfully submitted,

ROBERT G. SCOVILLE, Attorney
Box 155, South Sioux City, Nebr. 68776

RONALD K. SAMUELSON, Co. Attorney
of Thurston Co., Nebraska
Pender, Nebraska 68047

CLARENCE A. H. MEYER,
Attorney General of Nebraska

MELVIN KENT KAMMERLOHR,
Assistant Attorney General of
Nebraska
A Member of the Bar of this Court

By MELVIN KENT KAMMERLOHR
2119 State Capitol Building
Lincoln, Nebraska 68509

Attorneys for Petitioners.

APPENDIX NO. 1

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1002

OMAHA TRIBE OF NEBRASKA, a corporation, the TRIBAL COUNCIL of the Omaha Tribe of Nebraska; the MEMBERSHIP of the Omaha Tribe of Nebraska; EDWARD L. CLINE; LEONARD SPRINGER; CLEMENT MITCHELL; LAWRENCE COOK; VICTOR ROBINSON; VALENTINE PARKER, SR.; and WAYNE TYNDALL,

Appellees,

vs.

VILLAGE OF WALTHILL, Nebraska, a municipal corporation; GEORGE YOUNG; HON. LIDA HINKLE; LAWRENCE JEPSEN; GEORGE SCHEIDT; H. W. CULWELL; BEN KRAUSE; RAYMOND L. WINGETT; RALPH GRAY; EDWARD DONLIN; HON. BETTY J. BRONDUM; and CLYDE STORIE; THURSTON COUNTY, NEBRASKA and the STATE OF NEBRASKA,

Appellants.

Appeal from the United States District Court for the District of Nebraska

Submitted: May 12, 1972.

Filed: June 5, 1972.

Before MATTHES, Chief Judge, HEANEY and STEPHENSON, Circuit Judges.

PER CURIAM.

This controversy is between the Omaha Tribe of Nebraska, the Tribal Council of the Omaha Tribe and certain officers and members of the Council, as plaintiffs-appellees, and the Village of Walthill, Nebraska, Thurston County, Nebraska, the State of Nebraska, and certain village, county, and state officers, as defendants-appellants.

The dispute centers on the question of jurisdiction over crimes committed by or against Indians on the Omaha Reservation. Seeking a resolution of the problem, plaintiffs filed this action in the United States District Court for the District of Nebraska. They sought a declaration that exclusive jurisdiction over crimes committed by or against Indians is in the United States Government and the Omaha Tribe through the Federal Government, except as to offenses involving the operation of motor vehicles on public roads or highways.

Motions for summary judgment were filed by plaintiffs and defendants. The district court, Judge Robinson, granted the plaintiffs' motion and entered judgment accordingly. Defendants have brought the case here by appeal.

The controlling facts are fully detailed in the district court's opinion reported at 334 F. Supp. 823 (D. Neb. 1971). Reference to the legislative enactments and ensuing action by the authorities, which are the crucial aspects of this litigation will suffice for the purpose of this opinion. In 1953, the Congress of the United States, by appropriate legislation, provided that the State of Nebraska should have jurisdiction over civil causes of action and jurisdiction over offenses committed by or against

Indians on Indian reservations within the State of Nebraska to the same extent that the state had jurisdiction over other civil actions or criminal offenses. Nebraska assumed and exercised such jurisdiction. In 1968, Congress authorized the Federal Government to accept a retrocession by any state ". . . over all or any measure of the criminal or civil jurisdiction, or both, acquired by such state" (granted by 67 Stat. 588, 1953 Act). Acting pursuant to the 1968 enactment, the Nebraska Legislature adopted a resolution ceding to the Federal Government all of the Criminal jurisdiction over offenses committed by or against Indians in Thurston County, except motor vehicle offenses. In October, 1970, the Secretary of Interior accepted the state's retrocession as to the Omaha Indian Reservation, but not the Winnebago Indian Reservation, also located in Thurston County, Nebraska. The partial acceptance of Indian reservations in Thurston County precipitated this controversy.

Concisely stated, defendants assert that under the 1968 Act authorizing retrocession, the Federal Government was obligated to accept all or none of the Indian country in Thurston County. They submit acceptance of only the Omaha Reservation was a nullity and consequently Nebraska retains jurisdiction over offenses committed on the Omaha Reservation. Conversely, plaintiffs vouch for the validity of the partial acceptance.

The district court fully explored every facet of the issue in a soundly reasoned opinion and convincingly demonstrated that the retrocession acceptance procedures

comported with the 1968 Act and therefore exclusive jurisdiction over offenses committed on the Omaha Reservation is in the Federal Government.

We affirm on the basis of the opinion of Judge Robinson. See also *United States v. Brown*, 334 F. Supp. 536 (D. Neb. 1971), where Judge Denney considered the identical issue and reached the same result.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX NO. 2

OMAHA TRIBE OF NEBRASKA et al.,
Plaintiffs,

vs.

VILLAGE OF WALTHILL et al.,
Defendants.

Civ. 71-0-114.

United States District Court,
D. Nebraska.
Nov. 23, 1971.

Proceeding by Indian tribe, its tribal counsel, and its membership to enjoin village, county, state, and certain county and state officials from exercising criminal jurisdiction over the tribe. The District Court, Richard E. Robinson, Chief Judge, held that failure of Nebraska's Legislature to present to the Governor a resolution purporting to retrocede criminal jurisdiction over one Indian tribe to the federal government had no effect whatsoever upon the legal validity of the retrocession where such validity had not been raised by either the parties or the court in prior action in which the same resolution was under consideration, retrocession was accepted by the Secretary of Interior, and statute and executive order authorizing Secretary of Interior to accept such retrocession did not prescribe the type of retrocession notice which he had to receive from officials of a state.

Summary judgment for plaintiff.

• • • • •

William K. Schaphorst, Asst. U. S. Atty., D. Nebraska, for plaintiffs.

Robert G. Scoville, South Sioux City, Neb., Ronald K. Samuelson, Walthill, Neb., and Mel Kammerlohr, Asst. Atty Gen., for defendants.

MEMORANDUM

RICHARD E. ROBINSON, Chief Judge.

This matter comes before me upon the motion of plaintiffs and the cross-motion of defendants for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Said motions having been made verbally at the end of a hearing regarding plaintiffs' motion for a temporary injunction. [Filing No. 2].

Jurisdiction is vested by virtue of 28 U. S. C. § 1362.

All of the counsel appearing in this matter have been of considerable assistance to me in presenting the legal issues involved.

The plaintiffs in this action are the Omaha Tribe of Nebraska, the Tribal Council, and the Membership of the Tribe. The defendants are the Village of Walthill, Thurston County, The State of Nebraska, and certain named county and state officials.

In 1953 the United States Congress, by virtue of 67 Stat. 588,[1] provided that Nebraska should have both civil

---

1. This enactment is now embodied in 28 U. S. C. § 1360 and 18 U. S. C. § 1162. Section 1360 provides in pertinent part as follows:

"(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory	Indian country affected
•	•

(Continued on following page)

(Continued from previous page)

Nebraska * * * All Indian country within the State.

* * * *

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal Treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

Section 1162 provides in pertinent part:

"(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory	Indian country affected
* * * *	
Nebraska	All indian country within the State.

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal Treaty, agreement, or statute or

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and criminal jurisdiction over all the Indian country,[2] within the State of Nebraska, to the same extent as the State exercised jurisdiction in the rest of the State. The Act did not call for any formal acceptance by the State but apparently conferred jurisdiction automatically.[3] In any event, Nebraska did in fact commence exercising jurisdiction pursuant to the federal act, and it is thus clear that the State representatives did not deem it necessary to formally accept.

In 1968 Congress authorized the United States to accept retrocession by any state "* * * of all or any measure of the criminal or civil jurisdiction. * * *" granted

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with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

2. The definition of "Indian Country" is found at 18 U. S. C. § 1151.

3. In Anderson v. Gladden, 293 F. 2d 463 (9th Cir. 1961), cert. denied, 368 U. S. 949, 82 S. Ct. 390, 7 L. Ed. 2d 344 (1961), an Indian who had been tried by the state of Oregon for homicide, contended in a habeas corpus proceeding in federal court, that the State of Oregon, which had been included in 18 U. S. C. § 1162 along with the State of Nebraska, did not have jurisdiction to try him, without first enacting affirmative legislation accepting the jurisdiction which 18 U. S. C. § 1162 purported to bestow.

The Ninth Circuit said "(w)hether the courts of Oregon, upon the relinquishment of federal jurisdiction in this field, had jurisdiction under then existing state law to try Indians for such offenses is a state question." 293 F. 2d at 467. The Court then found that the Oregon State Supreme Court had decided that no implementing state

by 67 Stat. 588.[4] The United States Secretary of Interior was designated by the President to accept such retrocession on behalf of the United States.[5]

In 1969 the Nebraska Unicameral by resolution[6] pur-

(Continued from previous page)

legislation was needed, and held that the State Court's conclusion was binding on the federal courts. The Nebraska Supreme Court has never specifically decided whether a formal acceptance of the jurisdiction granted by 67 Stat. 588 is necessary. However, it can be implied from that Court's decision in State v. Goham, 187 Neb. 35, 187 N. W. 2d 305 (1971) that it was of the view that no formal acceptance was necessary.

4. See 25 U. S. C. § 1323 (a), which provides: "The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of Section 1162 of Title 18, section 1360 of Title 28. * * * " Pub. L. 90-284, Title IV, § 403, Apr. 11, 1968, 82 Stat. 79.

5. Executive Order No. 11435 of Nov. 21, 1968, 33 F. R. 17339 provides:

"Designating Secretary of Interior To Accept Retrocession of Jurisdiction by State.

By virtue of the authority vested in me by section 465 of the Revised Statutes (25 U. S. C. 9) and as President of the United States, the Secretary of the Interior is hereby designated and empowered to exercise, without the approval, ratification, or other action of the President or any other officer of the United States, any and all authority conferred upon the United States by section 403 (a) of the Act of April 11, 1968, 82 Stat. 79 (25 U. S. C. § 1323 (a)): **Provided,** That acceptance of retrocession of all or any measure of civil or criminal jurisdiction, or both, by the Secretary hereunder shall be effected by publication in the FEDERAL REGISTER of a notice which shall specify the jurisdiction retroceded and the effective date of the retrocession: **Provided further,** That acceptance of such retrocession of criminal jurisdiction shall be effected only after consultation by the Secretary with the Attorney General."

6. This was done by the adoption of Legislative Resolution 37 which provides as follows:

LEGISLATION OF NEBRASKA
EIGHTIETH SESSION
LEGISLATIVE RESOLUTION 37

(Continued on following page)

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Introduced by Legislative Council, C. W. Holmquist, 16th District, Chairman, W. H. Hasebrook, 18th District

* * * *

WHEREAS, the State of Nebraska was given civil and criminal jurisdiction over Indians and Indian territory in this state by the Act of Congress of August 15, 1953, generally known as Public Law 280: and

WHEREAS, the assumption of such jurisdiction has led to steadily increasing costs for law enforcement in certain counties of Nebraska and particularly in Thurston County; and

WHEREAS, because of restrictions in original grants of land in Thurston County to Indians and Indian tribes, Thurston County has not had a sufficient tax base to meet the increasing costs of law enforcement; and

WHEREAS, since 1957, state assistance has been provided for law enforcement purposes in Thurston County, and the cost of this assistance has increased each biennium; and

WHEREAS, Public Law 90-284, adopted as an Act of Congress on April 11, 1968, contains a number of provisions dealing with civil rights and jurisdiction of Indians; and

WHEREAS, Section 403 (a) of Public Law 90-284 provides that the United States is authorized to accept a retrocession of all or any measure of the jurisdiction acquired by a state pursuant to Public Law 280 of 1953; and

WHEREAS, a committee of members of the Legislature appointed by the Executive Board of the Legislative Council following adoption of Public Law 90-284 has studied the problems of law enforcement in Indian areas of this state and the question of a retrocession of jurisdiction, and has met with leaders of the Omaha and Winnebago tribes, county officials and officials of the Bureau of Indian Affairs.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NEBRASKA LEGISLATURE IN EIGHTIETH SESSION ASSEMBLED:

1. That the State of Nebraska hereby retrocedes to the United States all jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska, acquired by the State of Nebraska pursuant to Public Law 280 of 1953, except as provided in paragraph 2 of this resolution.

2. That the retrocession of jurisdiction contained in paragraph 1 of this resolution shall not apply to any offenses involving the operation of motor vehicles on public roads or highways.

3. That the Executive Board of the Legislative Council is hereby authorized and directed to take all necessary action to put this reso-

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portedly offered to retrocede to the United States all of the criminal jurisdiction over offenses committed by Indians in Indian country located in Thurston County, Nebraska, excepting motor vehicle offenses. The Indian country of Thurston County consisted of the Omaha and the Winnebago Indian Reservations.[7]

Since the retrocession offered by Nebraska concerned criminal jurisdiction the Secretary was required under the President's Executive Order[8] to consult with the Attorney General. The Secretary did so, and a letter from the Office of the Solicitor of the Department of the Interior, addressed to an Assistant Attorney General in the Criminal Division of the Department of Justice, dated February 6, 1970 shows that the Secretary had contacted both the Winnebago and Omaha Tribes in Thurston County, Nebraska, in regard to the retrocession. The letter states that although the Omaha Indian Tribe desired to be under federal jurisdiction the Winnebagos equally desired to remain under state jurisdiction. [A copy of the letter is appended hereto.]

A letter dated December 11, 1969, from the Executive Board of Nebraska's Legislative Council indicates

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lution into effect, such action to include arrangements with the Department of the Interior and the department's Bureau of Indian Affairs concerning the assumption of law enforcement responsibilities in the areas of Indian country covered by this resolution.

7. The Omaha Indian Tribe was ceded the land which now constitutes both the Omaha and Winnebago Indian Reservations by a treaty with the United States in 1854. 10 Stat. 1043. In 1865 the United States by treaty with the Omaha Indian Tribe purchased that portion of reservation land from said Indian Tribe which now forms the Winnebago Indian Reservation, 14 Stat. 667, and that land was ceded to the Winnebago Indian Tribe in 1865 by a treaty. 14 Stat. 671.

8. See Note 5 supra.

that that Board approved the transfer back to the federal government of the criminal jurisdiction over the Omaha Tribe alone. [A copy of the letter is appended hereto.]

Consistent with the desires of the two Indian tribes, and the approval of the aforesaid State Legislative Board, the Secretary of Interior accepted a retrocession of criminal jurisdiction as to the Omaha Indian Reservation in Thurston County, Nebraska, but not as to the Winnebago Indian Reservation in that Country.

Shortly after the purported retrocession had occurred the United States Bureau of Indian Affairs set up a Tribal Court and a temporary Tribal jail. A judge for the Tribal Court was appointed, and nine Indian policemen were employed. A substantial federal grant financed these implementations.

Despite the purported retrocession and the aforesaid change of circumstances, the non-Indian law enforcement agencies in Thurston County continued to arrest Omaha Indians on criminal charges, and non-Indian County and Municipal judges of the County continued to try members of the Omaha Tribe for offenses allegedly committed within the confines of the Omaha Indian Reservation. And, on February 1, 1971, the Nebraska Legislature purported to withdraw and rescind its previous offer of retrocession by a legislative resolution.[9]

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9. The purported withdrawal of retrocession was accomplished by the following Legislative Resolution:

LEGISLATURE OF NEBRASKA
EIGHTY-SECOND LEGISLATURE, FIRST SESSION

* * * *

(Continued on following page)

THE VALIDITY OF THE NEBRASKA RESOLUTION OFFERING A RETROCESSION.

The Legislative Resolution which was passed by the Nebraska Unicameral in 1969[10] purporting to offer the aforementioned retrocession of criminal jurisdiction over all Indian country in Thurston County, Nebraska, was not presented to the Governor of the State, contrary to a State Constitutional requirement.

Article IV, § 15 of the Nebraska Constitution now provides in pertinent part, as follows:

(Continued from previous page)

LEGISLATIVE RESOLUTION 16 Introduced by C. W. Holmquist, 16th District .....

WHEREAS, the Eightieth Session of the Nebraska State Legislature, 1969, adopted Legislative Resolution 37, relating to the retrocession to the United States of jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska, acquired by the State of Nebraska pursuant to Public Law 180 of 1953; and

WHEREAS, the United States has not accepted retrocession in accordance with the terms and provisions of said Legislative Resolution 37.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE EIGHTY-SECOND LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the action of the Eightieth Session of the Nebraska State Legislature, 1969, approving Legislative Resolution 37 is rescinded, and the offer of retrocession therein contained is withdrawn.

2. That a duly attested copy of this resolution be transmitted by the Clerk of the Legislature to the Secretary of Interior of the United States.

(Here appears signature of "Frank Marsh").

10. See note 6 supra.

> "Every bill passed by the legislature, before it becomes a law, and every order, resolution or vote to which the concurrence of both Houses may be necessary [except on questions of adjournment] shall be presented to the Governor. * * *"

In 1934 Article III, § 1 of the Nebraska Constitution was amended to provide for only a one house legislature, and to abolish the two house system. That section also provides:

> "All provisions in the constitution and laws of the state relating to the legislature, the Senate, the House of Representatives, joint sessions of the Senate and House of Representatives, Senator, or Member of the House of Representatives, shall insofar as said provisions are applicable, apply to and mean said Legislature of one chamber hereby created and the members thereof."

In this Judge's opinion the aforesaid Constitutional Amendment, in effect also amended Article IV, § 15 of the Constitution so as to require *all* orders, *resolutions* and votes of the Legislature to be presented to the Governor, whether or not such orders, resolutions or votes were of a type which theretofore had required the concurrence of both houses. Thus the 1969 retrocession resolution should have been presented to the Governor.

My view of how Article IV, § 15 of the Constitution was to be interpreted after 1934, is supported by Nebraska Legislative Bill 301, as found in the 1971 Nebraska Session Laws. That Bill is entitled in pertinent part as follows:

"A BILL

For an Act for submission to the electors of an amendment to Article IV sections 7 and 15, of the Constitution of Nebraska, relating to the executive: * * * to remove obsolete matter; * * *."

The proposed amendment would delete from Article IV, § 15 the reference to a concurrence of both Houses, so that that section if amended would then read as follows:

"Every bill passed by the Legislature, before it becomes a law, and every order, resolution or vote [except on questions of adjournment] shall be presented to the Governor."

Thus, when the preamble to the Bill is read together with the proposed amendment it is apparent that the drafters of the Bill considered the reference to a concurrence of both houses as "obsolete matter." The only thing which could have made the language obsolete, was the aforementioned 1934 Constitutional Amendment.

Since the reference to two houses in Article IV, § 15, has been obsolete since 1934 that provision should have been thereafter read by the Courts as the Constitutional Amendment proposed by Legislative Bill 301 would now make it read in actuality. In other words the amendment proposed by the aforesaid Bill is not an amendment of substance, but merely an amendment to conform the language of the provision to the manner in which it must already be read as a matter of Constitutional interpretation.

[1] Based upon the foregoing interpretation it is my conclusion that the Nebraska Constitution required that

the 1969 retrocession resolution passed by the Unicameral be presented to the Governor of the State.

[2] The question now presented is: What, if any, effect the failure of the Legislature to present the resolution to the Governor has upon the legal validity of the retrocession of jurisdiction being considered herein? For the reasons hereafter stated, it is my opinion that the failure of Nebraska's Legislature to present the resolution to the Governor had absolutely no effect whatsoever upon the legal validity of the retrocession.

I find it significant that the same resolution herein under consideration was before the Nebraska Supreme Court in the case of State v. Goham, 187 Neb. 35, 187 N. W. 2d 305 [1971], and that Court did not inquire into its procedural or Constitutional validity.

Since the Nebraska Supreme Court in *Goham* deemed the validity of the retrocession an important issue in whether or not it had subject matter jurisdiction of the case before it, that Court was under a duty to inquire into all aspects of the question which it deemed important, as is any Court which has its subject matter jurisdiction questioned in a particular case. Also, that Court surely must be charged with knowledge and notice of its own state Constitution, and the provisions therein.

The State of Nebraska, was a party in *Goham,* and is a party in this case. However, I do not deem it necessary to inquire into the technical subleties of res judicata or collateral estoppel, as it would be extremely difficult to say that under those doctrines the failure of the State to raise the procedural correctness of the resolution in

Goham would be a bar to this Court's inquiry into the matter.

In any event, this Court does give a good deal of weight in deciding this matter to the fact that the validity of Nebraska Resolution No. 37 was not raised by either the parties or the Court in *Goham*.

In the Nebraska case of Miller v. Hurford, 13 Neb. 13, 17, 12 N. W. 832, 834 [1882], a contention was made that a certain act was "• • • invalid because it was never presented to the governor." The Court in meeting this contention said, as follows:

> "The presumptions of the law are that a public officer performs his duty in the manner required by law, and when the speaker of the house of representatives and president of the senate certify that they presented a bill to the governor for his approval, it will be presumed that they presented such bill to the officer whose approval was necessary in order that the bill might become a law." 13 Neb. at 17, 12 N. W. at 834.

Although it is not entirely clear from a reading of the case whether the Court was referring to a conclusive presumption or merely a rebuttable presumption, it is more readily inferable that a conclusive presumption was intended.[11] *See also* Miller v. Hurford, 11 Neb. 377, 9 N. W. 477 [1881].

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11. The Legislative Resolution being considered herein, see note 6 supra, unlike the act involved in Miller, does not contain a certification by the President of the Legislature that it was presented to the Governor. Thus, a strong argument could be made that the presumption referred to in Miller was never even raised in the present case.

In the case of State ex rel. Casper v. Moore, 37 Neb. 13, 55 N. W. 299 [1893], the journals of the Legislature showed an item in an appropriation bill to be $15,000 while the enrolled bill [the one presented to the Governor] showed the amount to be $25,000. In other words, the bill presented to the Governor was not the bill actually enacted by the Legislature, and the bill actually enacted was in fact never presented to the Governor. Nonetheless the Nebraska Supreme Court upheld the bill which had actually been passed by the Legislature, even though never presented to the Governor. The Court indulged in the presumption that since the Governor actually approved the greater sum, approval of the lesser sum could be implied. One commentator has said: "It seems difficult to support the reasoning of this case." Nutting, The Enrolled Bill and the Validity of Legislation, 15 Neb. L. Bulletin 233, 236 [1937]. This Court would have to agree, but in any event the case manifests a definite reluctance on the part of the Nebraska Supreme Court to invalidate otherwise valid legislation, under the Constitutional provision calling for presentation of all bills to the governor. The aforementioned law review article also suggests that non-compliance with state constitutional provisions prescribing certain procedures in regard to legislation, such as presentation to the governor, constitutes a political question which the Courts need not get into, but for which the elected representatives must answer to the electors.

Even assuming that the Nebraska Supreme Court would hold that the resolution, under consideration herein, is invalid this writer is of the opinion such a holding

could not upset an otherwise valid retrocession under 25 U. S. C. § 1323 [a].[12]

In Leser v. Garnett, 258 U. S. 130, 137, 42 S. Ct. 217, 218, 66 L. Ed. 505 [1922], a contention was made that the Nineteenth Amendment to the Federal Constitution was invalid because the ratifying resolutions of Tennessee and West Virginia were inoperative, "• • • because adopted in violation of legislative procedure prevailing in the respective states." In meeting this argument the United States Supreme Court through the eminent Justice Brandeis said:

> "As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him, and being certified to by his proclamation, is conclusive upon the courts." [citations omitted] 258 U. S. at 137, 42 S. Ct. at 218.

It is true that unlike the *Leser* case we are not dealing with state ratification of an amendment to the Federal Constitution. But we are dealing with a federal statute[13] passed pursuant to the Federal Constitution, and the process involved herein, like that involved in *Leser* is a federal process which "• • • transcends any limitations sought to be imposed by the people of a state." 258 U. S. at 137, 42 S. Ct. at 218. If it were otherwise the executive branch of the United States Government would be subordinated to the provisions of the state con-

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12. See note 4 supra.

13. Supra.

stitutions. This cannot be. As said by the great Chief Justice Marshall in McCulloch v. Maryland, 17 U. S. [4 Wheat.] 316, 406, 4 L. Ed. 579 [1819]:

> "The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.'"

Thus, the question is not whether the state resolution was valid under state law, but whether it was valid under federal law. In other words, was the resolution a sufficient manifestation of assent by the State to enable the United States Secretary of Interior to accept a retrocession pursuant to the power bestowed upon him by the President[14] and the Congress?[15] I am of the opinion that it was.

My view is supported by the case of United States ex rel. Widenmann v. Colby, 49 U. S. App. D. C. 358, 265 F. 998 [1920]. That case involved the ratification of the Eighteenth Amendment to the Federal Constitution. The petitioner in that case contended that the notices of the several states ratifying the Amendment were not properly issued. Section 205 of the Revised Statutes of the United States provided:

> "Whenever official notice is received at the Department of State that any amendment proposed to the

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14. See note 5 supra.

15. See note 4 supra.

> Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."

In discussing the power vested in the Secretary of State as a result of the aforesaid statute the United States Court of Appeals for the District of Columbia Circuit stated as follows:

> "It will be observed that by this section is [sic] was the duty of the Acting Secretary of State, upon receiving official notice from three-fourths of the several States [Constitution, art. 5] that the proposed amendment had been adopted, to issue his proclamation. He was not required, or authorized, to investigate and determine whether or not the notices stated the truth. To accept them as doing so, if in due form, was his duty. As soon as he had received the notices from 36 of the states that the amendment had been adopted, he was obliged, under the statute, to put forth his proclamation. No discretion was lodged in him. The act required was purely ministerial. Now, there is no allegation in the petition of Widenmann that the Acting Secretary of State did not receive official notice from the requisite number of states, nor does the petitioner in argument claim that he did not. In fact, as we understand it, he admits that he did. His insistence is that the officials of the several states should not have issued the notices; but, as we have said, the Acting Secretary had no authority to examine into that matter, to look behind the notices. From these considerations it follows that the Acting Secretary, instead of failing to perform a duty

imposed upon him by statute, the performance of which should be coerced by Mandamus, performed a duty enjoined upon him by statute in issuing the proclamation in question. Under those circumstances there is no basis for the relief sought by the petitioner." [citations omitted] 265 F. at 999-1000.

Almost identical language could be used in describing the discretion and authority of the Secretary of Interior under 25 U. S. C. § 1323 [a][16] and the Executive Order pursuant thereto.[17] Section 1323 [a] did not prescribe the type of retrocession notice which the United States must receive from the officials of a state before an acceptance by the United States could occur. The Secretary was not authorized to investigate the procedural or technical validity of every notice he received. In this writer's opinion once the Secretary received from the state officials what appeared to be an official act of the state offering a retrocession, he was entitled to rely thereon for purposes of the acceptance authorized by the federal statute.

If the elected representatives of the State of Nebraska acted beyond their power in sending the Secretary of Interior a notice offering a retrocession of jurisdiction over certain Indian country, then they must answer to the people of the state for their negligence. This, however, is clearly a political question. *See* Coleman v. Miller, 307 U. S. 433, 59 S. Ct. 972, 83 L. Ed. 1385 [1939].

The great Justice Frankfurter in his concurrence in *Coleman* said:

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16. Supra.

17. See note 5 supra.

"The procedures for voting in legislative assemblies—who are members, how and when they should vote, what is the requisite number of votes for different phases of legislative activity, what votes were cast and how they were counted—surely are matters that not merely concern political action but are of the very essence of political action, if 'political' as any connotation at all. * * * In no sense are they matters of 'private damage'. They pertain to legislators not as individuals but as political representatives executing the legislative process. To open the law courts to such controversies is to have courts sit in judgment on the manifold disputes engendered by procedures for voting in legislative assemblies. * * *" 307 U. S. at 469-470, 59 S. Ct. at 989 [concurring opinion].

The procedural validity of the resolution herein is as much a political question as the procedural validity of the resolution presented in *Coleman*, and this Court will not decide a political question, but will defer to the decision by the Secretary of Interior that the notice he received from Nebraska was sufficient. *See also*, United States v. Gugel, 119 F. Supp. 897 [D. Ky. 1954]; United States v. Hunting Rights of Swan Lake Hunting Club, 237 F. Supp. 290 [N. D. Miss. 1964].

DID THE UNITED STATES SECRETARY OF INTERIOR ACT WITHIN THE POWER CONFERRED UPON HIM BY CONGRESS AND THE PRESIDENT, WHEN HE ACCEPTED A RETROCESSION OF CRIMINAL JURISDICTION ONLY AS TO THE OMAHA INDIAN TRIBE?

The defendants have argued that the purported acceptance of retrocession by the Secretary of Interior was

an abuse of the authority granted him by Executive Order No. 11435[18] and was in effect a void act. Accordingly, they contend that the State still has exclusive jurisdiction of the Omahas by virtue of the 1953 transfer of jurisdiction by the federal government.[19]

The Supreme Court for the State of Nebraska considered this very issue in a criminal case entitled State v. Goham, 187 Neb. 35, 187 N. W. 2d 305 [1971]. There the defendant raised as a defense against a charge of kidnapping and rape the argument that the State of Nebraska had lost jurisdiction over the defendant by reason of retrocession. The Supreme Court held that the retrocession never became effective because the acceptance of the Secretary of Interior was only a partial acceptance and unless or until it was approved by the State of Nebraska was of no force and effect. With this conclusion I cannot agree.

The Act providing for retrocession, 25 U. S. C. A. § 1323, authorized the United States to accept retrocession "• • • by any state of all or *any measure* of the criminal or civil jurisdiction • • • acquired by such State pursuant to the provisions of section 1162 of Title 18. • • •" As I see it, in the statute in which it was set forth "all or any measure" could be subject to two interpretations:

[1] That "all or any measure" means that the government has the right to accept all or part of the juris-

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18. Supra.

19. See note 1 supra.

diction offered by the State, and that a partial acceptance would be a valid acceptance.

[2] That an acceptance of "all or any measure" refers only to the actual offer of retrocession made by the State and acceptance of less than that which was offered would be an invalid acceptance.

The Supreme Court of Nebraska compared the offer and acceptance to a contract and reasoned that since the acceptance did not include all the jurisdiction offered it was "* * * completely unauthorized by the terms of the Resolution of the Nebraska Legislature, and so does not constitute an acceptance."

The problem I have in accepting this interpretation reached by the High Court of Nebraska is that here we are not considering a contract that was entered into between Nebraska and the United States Government, but rather a Legislative Act. The issue, as I see it, is simply whether the Secretary of the Interior was authorized in accordance with 25 U. S. C. § 1323 and Executive Order No. 11435 to accept a retrocession of less than that offered by the State of Nebraska. I believe he was.

[3] Section 1323 of Title 25 provides: "[T]he United States is authorized to accept a retrocession by any State * * *" The word "retrocession" refers to a complete act. When the Secretary of the Interior accepted the offer of retrocession by a state the retrocession referred to in the above-cited Statute occurred. The final act necessary to effectuate retrocession was expressly reserved to the United States Government. To accept defendant's contention that the partial acceptance by the

Secretary of Interior was a counter-offer that had to be accepted by the State of Nebraska would leave to the State the final act necessary for the occurrence of a complete retrocession. I believe that the words "[T]he United States is authorized to accept a retrocession by any State of all or any measure of criminal * * * jurisdiction * * * acquired by such State pursuant to the provisions of section 1162 of Title 18 * * *" refutes the above contention and gives the United States Government the right to accept "any measure" of the jurisdiction offered back to it by a State. When reading a statute effect must be given, if possible, to the whole statute and every part thereof. *See* D. Ginsburg & Sons v. Popkin, 285 U. S. 204, 52 S. Ct. 322, 76 L. Ed. 704 [1931].

[4] The defendants argue that the Secretary of Interior's acceptance was ineffective because it exceeded his granted authority. With the general proposition that "administrative determinations must have a basis in law and must be within the granted authority" I have no quarrel. *See* Social Security Board v. Nierotko, 327 U. S. 358, 66 S. Ct. 637, 90 L. Ed. 718 [1946]. However, here I feel 25 U. S. C. § 1323 and Executive Order 11435 give the Secretary of Interior the authority to accept part of the offer of retrocession.

Further support for the conclusion I have reached is found in the statute by its providing for piecemeal retrocession. The statute expressly allowed for retrocession of all or any measure of criminal or civil jurisdiction, or both. Such flexibility reflects an intention to allow the Secretary the power to divide the jurisdiction.

[5] Further 25 U. S. C. § 1323 [a] should be read in light of the legislative and judicial policy of construing statutes in favor of Federal jurisdiction, *see* Rice v. Olson, 324 U. S. 786, 65 S. Ct. 989, 89 L. Ed. 1367 [1945], and, according to the familiar rule that "legislation affecting the Indians is to be construed in their interest. * * *" United States v. Nice, 241 U. S. 591, 599, 36 S. Ct. 696, 698, 60 L. Ed. 1192 [1916].

A great deal of weight must be given to the conclusion of the Secretary of Interior as to the extent of his power and authority under 25 U. S. C. § 1323[20] and Executive Order 11435.[21] Dixon v. Cox, 268 F. 285 [8th Cir. 1920].

In addition, it may well be that under a principle of law announced by the United States Supreme Court, the Secretary of Interior had no choice but to defer to the desires of the individual Indian tribes as to whether they wanted to be under federal jurisdiction. In the case of In re Heff, 197 U. S. 488, 25 S. Ct. 506, 49 L. Ed. 848 [1905] Mr. Justice Brewer in speaking for the Court stated:

> "We are of the opinion that, when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of, and requires him to be subject to, the laws, both civil and criminal, of the state, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control, thus created, cannot be set aside at the instance of the government without the

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20. See note 4 supra.

21. See note 5 supra.

> consent of the individual Indian and the state, * * *" 197 U. S. at 509, 25 S. Ct. at 512.

Heff was overruled by United States v. Nice, 241 U. S. 591, 36 S. Ct. 696, 60 L. Ed. 1192 [1916] but on another point of law.

Although the United States Supreme Court held in Elk v. Wilkens, 112 U. S. 94, 5 S. Ct. 41, 28 L. Ed. 643 [1884], that Indians did not acquire citizenship by virtue of the Fourteenth Amendment to the United States Constitution, that injustice was cured by the Citizenship Act of June 2, 1924, 8 U. S. C. § 1401, making citizens of all Indians. *See also,* Deere v. New York, 22 F. 2d 851 (N. D. N. Y. 1927). Thus, when jurisdiction over the Indians in Indian country within the State of Nebraska was given to the State in 1953 by the federal government,[22] the Indians became fully emancipated according to the above language of the Heff case, and if that language still has merit the federal government could not reacquire jurisdiction without the consent of both the State and the Indians.

[6] Although the language of *Heff* refers to the consent of "the individual Indian" this Court is of the opinion that such consent can be manifested by the democratic process of assent through the tribal council, and thus whatever that body consents to binds all members of the tribe.

Therefore, when the State offered to retrocede criminal jurisdiction as to both the Winnebago and Omaha In-

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22. See note 1 supra.

dian Tribes, only part of the process was initiated, since according to *Heff*, the Secretary of Interior in acting for the United States was also under an obligation to determine the desires of the Indians as well. In doing so he found that the Winnebagos did not consent to the resumption of federal jurisdiction, and he was therefore powerless, under *Heff*, to acquire jurisdiction over them.

On the other hand, the Omahas did consent to resumption of federal jurisdiction, and the Secretary could pursuant to *Heff* acquire jurisdiction over them.

In short, under *Heff*, the Secretary of Interior in exercising the authority vested in him by Congress and the President, could not have done otherwise than what he did. He could accept jurisdiction only as to those Indians who consented (i. e., the Omahas).

[7] It is therefore this Court's conclusion that the action of the United States Secretary of Interior in accepting a retrocession by the State of Nebraska of the criminal jurisdiction of only the Omaha Indian Tribe in Thurston County, Nebraska was within the power and authority bestowed upon him by the Congress and the President, even though the State offered a retrocession as to both the Omahas and Winnegabos in said county. And no state constitutional provision, statute, or judicial decision can reduce the power which the Secretary of Interior of the United States has acquired by an Act of Congress, because when such an Act, passed pursuant to the Federal Constitution, conflicts with a state constitutional provision, statute or judicial decision the Act of Congress according to Article VI, clause 2 of the United

States Constitution controls. *See also* McCulloch v. Maryland, 17 U. S. (4 Wheat.) 316, 406, 4 L. Ed. 579 (1819).

It is an argument such as that advanced by defendants herein which prompted Chief Justice Marshall in Gibbons v. Ogden, 22 U. S. (9 Wheat.) 1, 6 L. Ed. 23 (1824), to remark:

> "Powerful and ingenious minds, taking as postulates, that the powers expressly granted to the government of the Union, are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the states are retained, if any possible construction will retain them, may, by a course of well-digested, but defined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles, which were before thought quite plain, and induce doubts, where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles, to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined." 22 U. S. (4 Wheat.) at 220.

DID THE STATE OF NEBRASKA ACQUIRE CRIMINAL AND CIVIL JURISDICTION OVER THE OMAHA TRIBE OF INDIANS BY VIRTUE OF THE LAND ALLOTMENT ACT OF 1882?

The defendants further contend that the State of Nebraska had already acquired criminal and civil juris-

diction over the Omaha Tribe of Indians as a result of an Act of Congress on August 7, 1882, 22 Stat. 341.[23] Under

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23. Sections 6 and 8 of the 1882 Act provide:

"Sec. 6. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotments shall have been made, or in case of his decease, of his heirs according to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: **Provided,** that, the law of descent and partition in force in the said State shall apply thereto after patents therefor have been executed and delivered.

"Sec. 8. That the residue of lands lying east of the said right of way of the Sioux City and Nebraska Railroad, after all allotments have been made, as in the fifth section of this act provided, shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented, for the period of twenty-five years in trust for the sole use and benefit of the said Omaha tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha Tribe of Indians, in fee discharged of said trust and free of all charge or incumbrance whatsoever: **Provided,** That from the residue of lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in section six of this act, touching patents to allottees therein mentioned. But such conditions, restrictions, and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common."

(Continued on following page)

the enactment the United States was to allot to certain described members of the tribe a portion of land within the reservation, and was to later issue patents to said Indians for said land. Upon completion of both the allotments and issuance of patents each member of the tribe was to "* * * have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska. * * *"

[8] Accordingly, the purpose of the above-mentioned statute was to distribute all of the land of the Omaha Reservation to members of the Omaha Tribe and upon completion of all grants of real estate to render all members of the Tribe subject to the state civil and criminal laws. Allotments under Section 6 were completed in July of 1884. Allotments under Section 8 of the Act were to continue during the twenty-five year trust period, in order that after-born children could be allotted the residue of lands remaining after the Section 6 allotments. Section 7 expressly applied to Section 6 and Section 8 allotments. In effect the statute provided that trust patents would be issued immediately and fee patents twenty-five years after the completion of the allotment.

Accordingly, State law was to apply within the Omaha Reservation when two things occurred:

(Continued from previous page)

Section 7 of said statute provided:

"Sec. 7. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska: and said State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law."

(1) The completion of the allotments; and (2) the patenting of the land to the allottees.

It is apparent from the Act of 1882 that it was the intention of Congress that when all Indian land was in individual ownership, State law should commence to apply and that Federal jurisdiction would then be withdrawn. *See* United States v. Ramsey, 271 U. S. 467, 46 S. Ct. 559, 70 L. Ed. 1039 (1926).

However, as allotments were carried out the Indian tribal organizations did not disappear and the Indian allegiances to tribal customs were not abandoned. This may explain in part why several of the allotments were never completed, and why many of the recipients of allotments were never issued fee patents. But why did the government continue to hold the land in trust for the Indians? See Affidavit of Alfred DuBray, Superintendent of the Winnebago Agency of the Bureau of Indian Affairs, Department of Interior of the United States Government (Filing No. 17).

[9] Thus as the requirements of Section 7 of the 1882 Act have not been met the criminal jurisdiction within the Omaha Reservation was not passed to the State of Nebraska by virtue of this statute. There have been further Federal Acts regarding the allotment of land on the Omaha Reservation, but none of these statutes affects the jurisdictional question here under discussion, and the recital of same would add nothing but length to this opinion.

Defendants have cited no other statutory authority for asserting criminal jurisdiction over the Omaha Reser-

vation but do make reference to the case of Hallowell v. United States, 221 U. S. 317, 31 S. Ct. 587, 55 L. Ed. 750 (1911). There the Supreme Court of the United States considered a question certified to it by the Eighth Circuit Court of Appeals. The question was simply whether under the Federal statutes herein cited could the United States Government prohibit the bringing of intoxicating liquors on the Omaha Tribe Reservation. Justice Day, after setting forth Sections 6 and 7 of the 1882 Act also set forth Section 6 of the Act of February 8, 1887, 24 Stat. 388. This section provided:

> "Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Justice Day then made the general comment that:

> "It is apparent that, at the time of the commission of the alleged offense, the place wherein it was alleged to have been committed was a part of lands allotted to an Indian; that the title to the lands allotted was still held in trust by the United States for the benefit of the Indian to whom the allotment had been made; that the plaintiff in error had been declared to be a citizen of the United States, and entitled to the rights, privileges, and immunities of such citizenship, and entitled to the benefit of the laws, civil and criminal, of the state of Nebraska, in which the Indian allotment was situated, and upon which the offense is alleged to have been committed."

The Court later in the opinion added:

> "While for many purposes the jurisdiction of the state of Nebraska had attached, and the Indian as a citizen was entitled to the rights, privileges, and immunities of citizenship. • • •"

The High Court then went on to answer the question certified to it by the lower court. It is obvious this case lends no weight to defendants' position. There is general language in the case that, "[W]hile for many purposes the jurisdiction of the state of Nebraska" had some type of operation within the Omaha Reservation, the case did not define what this jurisdiction might have been. Further, in *Hallowell*, the court considered the Act of 1887 as well as the 1882 Act. The 1887 Act provided that state criminal and civil law should apply to individual Indians when and if they received allotments and patents and departed from their allegiance to an Indian tribe. The defendant in *Hallowell* was also an allottee under the Act of 1887. *See Hallowell, supra*, at page 320, 31 S. Ct. 587.

In any event the case of United States v. Nice, 241 U. S. 591, 36 S. Ct. 696, 60 L. Ed. 1192 (1916) casts extreme doubt upon any argument that Nebraska acquired exclusive jurisdiction, either civil or criminal, over the Omahas as a result of the Allotment Act.

[10] Any contention of defendants that a State has exclusive jurisdiction over crimes committed within its borders is foreclosed by the Supreme Court's decision in Rice v. Olson, 324 U. S. 786, 65 S. Ct. 989, 89 L. Ed. 1367 (1945), and the Nebraska Supreme Court's decision in Ex Parte Cross, 20 Neb. 417, 30 N. W. 428 (1886).

Accordingly, I have concluded that criminal jurisdiction over crimes committed by or against Indians within the confines of the Omaha Reservation rests in the Federal Government.

In Kitto v. State, 98 Neb. 164, 152 N. W. 380 (1915) the Supreme Court for the State of Nebraska observed that Congress had not reserved to the federal courts the jurisdiction to punish for misdemeanors. The Court noted that there was no Federal Act that gave jurisdiction to the federal courts for such crimes and that "[I]f such jurisdiction is not vested in the state courts, it is not vested anywhere and the perpetrators of misdemeanors of all kinds on an Indian reservation may go unpunished." Kitto v. State, 152 N. W. at page 383. I would be inclined to follow this rationale as to misdemeanors but the evidence adduced at the hearing held in this matter established to my satisfaction that Omaha Indian Tribe has a qualified police force and is able to properly prosecute misdemeanors. The Omaha Indian Tribe did offer to deputize Walthill Police Officers as the Tribe police in

order to give them jurisdiction over Indian crimes on behalf of the Tribe, but said offer was turned down.

Accordingly, the state of affairs as they exist today removes the present action from the rationale of *Kitto*.

[11] Plaintiff has asked for an accounting of all fines, penalties and costs collected on account of prosecutions of Indians of crimes committed within the Omaha Reservation since October 25, 1970. I do not feel said relief is justified under the circumstances heretofore presented. The Thurston County officials were acting within and under the justified belief that they had jurisdiction for misdemeanors. Accordingly, said relief will not be granted.

The offer of retrocession retained jurisdiction for all motor vehicle offenses committed on the state public roads or highways and this jurisdiction will remain exclusively within the State of Nebraska.

The Federal Government has exclusive jurisdiction of all major crimes enumerated in the federal statutes granting said jurisdiction (18 U. S. C. § 1153).

Counsel for the plaintiffs will submit a proposed judgment for my approval within ten (10) days from the date of this Memorandum.

APPENDIX A

December 11, 1969

Mr. Louis R. Bruce
Commissioner of Indian Affairs
1951 Constitution Avenue, N. W.
Washington, D. C.

Dear Mr. Bruce:

A report has been made to the Executive Board of the Nebraska Legislative Council by Senator Claire Holmquist and Mr. George Gerdes as a result of their recent trip to Washington. The essence of this report was that the control over criminal justice of the Omaha Tribe should be transferred back to the Bureau of Indian Affairs.

This is to inform you that the Executive Board of the Legislative Council has approved this report and its recommendations.

Sincerely,

(s) Jack W. Rodgers
Jack W. Rodgers
Director of Research

JWR/ss

APPENDIX B

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D. C. 20240

Feb. 6, 1970

Honorable Will R. Wilson
Assistant Attorney General
Criminal Division

Department of Justice
Washington, D. C. 20530

Dear Mr. Wilson:

Enclosed is a certified copy of Legislative Resolution 37 of the Eightieth Session of the Legislature of Nebraska, purporting to retrocede to the United States pursuant to Section 403 of the Civil Rights Act of April 11, 1968, 82 Stat. 73, 79, 25 U. S. C. § 3323 (Supp. IV, 1965-1968), all jurisdiction over offenses (except those involving the operation of motor vehicles over public roads or highways) committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska, acquired by the State of Nebraska pursuant to the Act of August 15, 1953, 67 Stat. 588, as amended, 18 U. S. C. § 1162.

Thurston County, Nebraska, contains major portions of two Indian reservations under the jurisdiction of the United States, each constituting a separate area of "Indian country" as defined in 18 U. S. C. § 1151. One such reservation is for the Winnebago Tribe; the other is for the Omaha Tribe. The Omaha Reservation also extends into adjoining counties of Cuming and Burt, and the Winnebago Reservation extends into adjacent Dixon County. Only Thurston County is mentioned in Legislative Resolution 37.

The tribal governing bodies of both tribes have on several occasions considered the desirability of having their reservations continued under state jurisdiction vis-a-vis having them returned to federal jurisdiction. The Omahas have consistently expressed the desire that the

United States accept the retrocession tendered by the State of Nebraska; the Winnebagos have with equal consistency expressed the desire to remain under state jurisdiction.

The matter of partial acceptance of Nebraska's tender has been discussed with representatives of both tribes and of the State. We perceive no legal obstacle to such a course. The Executive Board of the Legislative Council of Nebraska has been informed of the situation and has approved acceptance by the United States of jurisdiction over the Omaha Reservation only. Enclosed is a copy of a letter of December 11, 1969, to the Commissioner of Indian Affairs from the Director of Research of the Legislative Council, which evidences such approval.

The law enforcement situation on the Omaha Reservation is a matter of concern to the tribe and to this Department, and representatives of the State of Nebraska have told us that the state is not able to increase its program. If anything, it is expected to decrease at the end of the current fiscal year. The Nebraska State Legislature does not meet until 1971, and it is important that action be taken as soon as possible to improve the law and order program on the Omaha Reservation.

We are, therefore, prepared to accept partially the tender of retrocession made by Nebraska, accepting jurisdiction only with respect to the Omaha Reservation. Enclosed is a copy of a proposed Notice of Acceptance of Retrocession of Jurisdiction which we believe will accomplish the desired end and the intended purpose. Before presenting the notice to the Secretary, however, we take

this means of seeking your consultation as provided by Executive Order No. 11435, of November 21, 1968.

We will be glad to provide such additional information as you may feel necessary.

Sincerely yours,

/s/ Raymond C. Coulter
Acting Solicitor

Enclosures
cc: Secretary's Files
Solicitor's Files
BLA (2)
Asst. Sol. ILA
Assoc. Sol. IA
CMSoller:mes:1-30-70

* * * * *

APPENDIX NO. 3

FORTY-SEVENTH CONGRESS. SESS. I. CH. 434. 1882.

CHAP. 434.—An act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That with the consent of the Omaha Tribe of Indians, expressed in open council, the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of

April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior, July twenty-seventh, eighteen hundred and eighty. The said lands shall be appraised, in tracts of forty acres each, by three competent commissioners, one of whom shall be selected by the Omaha tribe of Indians, and the other two shall be appointed by the Secretary of the Interior.

SEC. 2. That after the survey and appraisement of said lands the Secretary of the Interior shall be, and he hereby is authorized to issue proclamation to the effect that unallotted lands are open for settlement under such rules and regulations as he may prescribe. That at any time within one year after the date of such proclamation, each bona fide settler, occupying any portion of said lands, and having made valuable improvements thereon, or the heirs at law of such settler, who is a citizen of the United States, or who has declared his intention to become such, shall be entitled to purchase, for cash, through the United States public land office at Neligh, Nebraska, the land so occupied and improved by him, not to exceed one hundred and sixty acres in each case, according to the survey and appraised value of said lands as provided for in section one of this act; *Provided,* That the Secretary of the Interior may dispose of the same upon the following terms as to payments, that is to say, one-third of the price of said land to become due and payable one year from the date of entry, one-third in two years, and one-third in three years, from said date, with interest at the rate of five per centum per annum; but in case of default in either of said payments the person thus defaulting for a period of sixty days shall forfeit absolutely his right to the tract which he has purchased and any payment or payments he might have made: *And provided further,* That whenever any person shall under the provisions of this act settle upon a tract containing a fractional excess over one hundred and sixty acres, if the excess is less than forty acres, is contiguous, and results from inability in survey to make township and section lines conform to the boundary lines of the reservation, his purchase shall not be rejected on

account of such excess, but shall be allowed as in other cases: *And provided further,* That no portion of said land shall be sold at less than the appraised value thereof, and in no case for less than two dollars and fifty cents per acre; *And provided further,* That all land in township twenty-four, range seven east, remaining unallotted on the first day of June, eighteen hundred and eighty-five, shall be appraised and sold as other lands under the provisions of this act.

SEC. 3. That the proceeds of such sale, after paying all expenses incident to and necessary for carrying out the provisions of this act, including such clerk hire as the Secretary of the Interior may deem necessary, shall be placed to the credit of said Indians in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum, which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior.

SEC. 4. That when purchasers of said lands shall have complied with the provisions of this act as to payment, improvement, and so forth, proof thereof shall be received by the local land office at Neligh, Nebraska, and patents shall be issued as in the case of public lands offered for settlement under the homestead and preemption acts: *Provided,* That any right in severalty acquired by any Indian under existing treaties shall not be affected by this act.

SEC. 5. That with the consent of said Indians as aforesaid the Secretary of the Interior be, and he is hereby, authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company, under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior July twenty-seventh, eighteen hundred and eighty, in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one quarter of a section; to each single per-

son over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other person under eighteen years of age, one sixteenth of a section; which allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March sixth, eighteen hundred and sixty-five, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs, as in said article provided: *Provided,* That any Indian to whom a tract of land has been assigned and certificate issued, or who was entitled to receive the same, under the provisions of said fourth article, and who has made valuable improvements thereon, and any Indian who being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract, shall have a preference right to select the tract upon which his improvements are situated, for allotment under the provisions of this section: *Provided further,* That all allotments made under the provisions of this section shall be selected by the Indians, heads of families selecting for their minor children, and the agent shall select for each orphan child; after which the certificates issued by the Commissioner of Indian Affairs as aforesaid shall be deemed and held to be null and void.

SEC. 6. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by patent

to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That, the law of descent and partition in force in the said State shall apply thereto after patents therefor have been executed and delivered.

SEC. 7. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska; and said State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law.

SEC. 8. That the residue of lands lying east of the said right of way of the Sioux City and Nebraska Railroad, after all allottments have been made, as in the fifth section of this act provided, shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of the said Omaha tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha tribe of Indians, in fee discharged of said trust and free of all charge or incumbrance whatsoever; *Provided,* That from the residue of lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in section six of this act, touching patents to allottees therein mentioned. But such conditions, restrictions, and limitations shall not extend

beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common: *And provided further*, That these patents, when issued, shall override the patent authorized to be issued to the tribe as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in the patent issued to the tribe: *Provided*, That said Indians or any part of them may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation either east or west of said right of way mentioned in the first section of this act.

SEC. 9. That the commissioners to be appointed by the Secretary of the Interior under the provisions of this act shall receive compensation for their services at the rate of five dollars for each day actually engaged in the duties herein designated, in addition to the amount paid by them for actual traveling and other necessary expenses.

SEC. 10. That in addition to the purchase, each purchaser of said Omaha Indian lands shall pay two dollars, the same to be retained by the receiver and register of the land office at Neligh, Nebraska, as their fees for services rendered.

Approved, August 7, 1882.

APPENDIX NO. 4

56 S. C. J. 35

Advance Sheets

JANUARY TERM, 1971
STATE OF NEBRASKA,

vs.

WAYNE GOHAM,

— N. W. 2d —

Filed May 28, 1971. No. 37744

1. Criminal Law: Venue: Appeal and Error. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed.

2. Criminal Law: Statutes: Sentences. Where a criminal statute is amended by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.

3. Criminal Law: Kidnapping: Sentences. The purpose of kidnapping in every instance is to make it possible to commit some other crime. Its very nature therefore embraces other crimes as well as that of kidnapping. The penalties of kidnapping are intentionally more severe than the other crimes which may be included because of the consequences which often result from its perpetration.

4. New Trial: Witnesses: Evidence. It is the rule that a new trial will not be granted on the grounds of newly discovered evidence when the only effect of the evidence is to impeach or discredit the witness.

5. Criminal Law: Attorneys at Law. A charge of inadequate representation can prevail only if it can be said that what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the court.

6. Criminal Law: Indians: Jurisdiction. The Secretary of the Interior having failed to accept the offer of retrocession embraced in Legislative Resolution 37, Eight-

ieth Session of the Nebraska Legislature, 1969, before it was withdrawn by Legislative Resolution 16, Eighty-second Session of the Nebraska Legislature, 1971, 18 U. S. C. A., section 1162, is still applicable in Nebraska.

Appeal from the district court for Thurston County: Joseph E. Marsh, Judge. Affirmed as modified.

William G. Line of Kerrigan, Line & Martin and Costello, Porter, Hill, Banks & Nelson, for appellant.

Clarence A. H. Meyer, Attorney General, and Ralph H. Gillan, for appellee.

Heard before Spencer, Boslaugh, Smith, McCown, Newton, and Clinton, JJ.

Spencer, J.

Defendant Wayne Goham was convicted on an information charging kidnapping and rape, and sentenced to life imprisonment on the former and to a term of not less than 3 nor more than 20 years on the latter. We affirm the convictions but modify the sentence as set out hereafter.

An automobile in which the complaining witness and her companion were riding slid off the road when they tried to negotiate a slippery, rain-soaked county road in Thurston County. Another car, containing seven Indian occupants, came by and the occupants, for two dollars, helped them to get their car moving. The car was backed down the hill, but after a short descent its progress was stopped by the other car which had passed it and blocked the road. The occupants of that car then approached, opened the door on the driver's side, and pulled the com-

panion of the complaining witness from the car, striking him two or three times. He fled to seek help at an adjoining farm house. Two of the occupants of the other car then forcibly pulled the complaining witness out of her car, dragged her to their own, and drove approximately 2 miles to Big Elk Park, which lies along the Missouri River on the eastern border of and in Thurston County, where she was taken out of that car and raped by each of the seven occupants.

William Cayou, who was one of the seven, testified for the State, identified the defendant as the driver and owner of the car, and as the second of the group to be with the complaining witness in the park. The defendant is a member of the Omaha Indian Tribe. The crimes were committed within the limits of the Omaha Indian Reservation, which is situated within Thurston County. The incident occurred on July 26, 1969. Defendant was tried and convicted in March, 1970. On October 24, 1970, while an appeal from the conviction was pending in this court, the Secretary of the Interior published a notice in the Federal Register purporting to accept retrocession of jurisdiction over the Omaha Indian Reservation in Thurston County, Nebraska, purportedly pursuant to an offer of retrocession previously made by the Nebraska Legislature in accordance with 25 U. S. C. A., section 1323.

Defendant sets out seven assignments of error. The first is the denial of defendant's motion for a change of venue. He contends that "An avalanche of anti-Indian publicity" in Thurston County where the crime took place made it impossible to select a fair jury. The record does not support his contention. Defendant concedes his mo-

tion for a change of venue was technically defective in that it sought a change of venue to the district court for Douglas county rather than to an adjoining county, and that it was not supported by affidavits. The voir dire examination of the jurors, which is a part of the record, indicates that 79 prospective jurors were called. While a substantial number of them had heard about the case through the various news media, which is not unusual in a case of this nature, the record does not reflect prejudice existing at the time of the trial, which was 8 months later, to sustain defendant's contention. Defendant was able to secure an impartial jury and passed it for cause. Further, no specific complaint of any nature is made herein as to any bias or improper conduct on the part of the jury or any individual juror.

In State v. Losieau, 174 Neb. 320, 117 N. W. 2d 775, we said: "A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed."

In Dosek v. United States, 405 F. 2d 405, the Court of Appeals for the Eighth Circuit said: "The disposition by a judge of a change of venue motion rests largely in the discretion of the trial court who is the one most familiar with the local situation, and a trial court ruling upon such a motion will be upset only for a clear abuse of discretion." In that case the Court of Appeals emphasized that defendant had not charged or proved that any juror challenged for cause on valid grounds was not excused.

Defendant's second and third assignments of error involve the penalty inflicted on the kidnapping charge. After the crime was committed but before trial, the Nebraska Legislature amended section 28-417, R. R. S. 1943, to provide that the penalty should be death or imprisonment for not less than 3 nor more than 50 years at the discretion of the jury. The penalty in effect when the crime was committed provided the death penalty or life imprisonment at the discretion of the jury. The penalty inflicted was in accordance with the statute as it existed at the time the offense was committed. In view of our subsequent holding in State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225, the State concedes that the amendment to section 28-417, R. R. S. 1943, which became effective September 19, 1969, should govern the penalty in this case.

In State v. Randolph, *supra*, we said: "There was no specific provision in the amending statute indicating legislative intent as to its prospective or retroactive operation. Section 49-301, R. R. S. 1943, provides that repeal of a statute shall not in any manner affect pending actions nor causes of action accrued prior to any such repeal except as may be provided in the repealing statute. This 'saving clause' on repeal applies to both civil and criminal statutes.

"While there is still some divergence of opinion among the states, we believe the better rule to be and we therefore hold that where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is

that provided by the amendatory act unless the Legislature has specifically provided otherwise.

"The basic issue is, of course, the intention of the Legislature. As the Supreme Court of California said in In re Estrada, 63 Cal. 2d 740, 48 Cal. Rptr. 172, 408 P. 2d 948 (1965): 'It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology.' "

State v. Rudolph, *supra,* which involved the kidnapping statute, section 28-417, R. R. S. 1943, was not released until January 22, 1971. This was several months after defendant's trial in March, 1970.

Section 29-2308, R. R. S. 1943, provides: "In all criminal cases that now are, or may hereafter be pending in the Supreme Court on error, the court may reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury,

or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

We said in Cryderman v. State, 101 Neb. 85, 161 N. W. 1045, that this statute should be liberally construed in favor of justice. In State v. Hall, 176 Neb. 295, 125 N. W. 2d 918, we construed it to grant authority to permit the reduction of a jury-imposed death penalty to life imprisonment when the circumstances indicated to us that life imprisonment was an adequate punishment for the offense.

We have no doubt of defendant's guilt herein. The misdirection of the jury as to possible penalties could not be considered a miscarriage of justice because it results from a subsequent construction of the statute involved. A verdict of life imprisonment was a permissible penalty for kidnapping when the offense was committed. This is no longer a penalty under our subsequent holding in State v. Randolph, *supra*. The maximum penalty under the amended statute which became effective September 19, 1969, 6 months before the actual trial herein, is death or imprisonment for not less than 3 nor more than 50 years. We hold the amendatory act may be applied constitutionally to the act herein although committed prior to its passage, because the sentence had not become final because of this appeal.

Pursuant to section 29-2308, R. R. S. 1943, considering all the circumstances and our subsequent holding in

State v. Randolph, 186 Neb. 297, 183 N. W. 2d 225, we reduce the penalty on Count I, the kidnapping conviction, from life imprisonment to a term of 35 years.

Defendant's fourth assignment of error is directed to the submission of the kidnapping charge. He relies on People v. Daniels, 71 Cal. 2d 1119, 80 Cal. Rptr. 897, 459 P. 2d 225, and People v. Levy, 15 N. Y. 2d 159, 204 N. E. 2d 842, and argues that the modern trend is away from the use of kidnapping charges for behavior that amounts in substance to robbery or rape. We see no reason to change the controlling rule in this jurisdiction. The victim herein was forcibly taken from the automobile in which she was a passenger and transported at least 2 miles to Big Elk Park where she was forcibly raped. The kidnapping statute, section 28-417, R. R. S. 1943, as it existed when the act was committed, so far as pertinent herein, provides: "Whoever, having for any of the purposes aforesaid unlawfully carried off or enticed away, decoyed, secreted or imprisoned any person, shall in furtherance of any such purpose, do or threaten to do any injury to the person so carried off, decoyed, enticed away, secreted or imprisoned, such person so offending shall upon conviction suffer death or be imprisoned in the Nebraska Penal and Correctional Complex during the remainder of his natural life at the discretion of the jury." We last interpreted this issue in State v. Tatreau, 176 Neb. 331, 126 N. W. 2d 157, and State v. Salentino, 176 Neb. 393, 126 N. W. 2d 164, which provide a conclusive answer to defendant's contentions.

Defendant, in his fifth assignment of error, argues that the evidence was insufficient to sustain a convic-

tion of kidnapping. The following testimony of the victim on direct examination illustrates the nature of the force used to effect the kidnapping: "Then they started to pull me out of the car, and I tried to hang on to the steering wheel and force myself against the frame of the car so they couldn't pull me out, and I said just leave us alone, and there was an individual on each side of me, and they pulled me over to their car, and I was kicking and trying to fight with them but they were just too heavy or too big and I couldn't get away from them, and when we got down to their car they tried to push me in the car, and I was very stiff, and they knocked my head against the open door so I was kind of dizzy for a few minutes, and then someone sort of like hit me in the stomach so that I would bend over, and that is when they put me in the front seat of the car, and then I remember kicking someone in the stomach who was pushing me in the car, and then they got in the car and one individual had his hand over my mouth and nose so that I couldn't breathe and I was a little panicky and when he let me go I said I couldn't breathe and I wanted the window down, so I was sitting on the lap of the person who was by the door and I had my head out of the window all the time to the park. That is where they drove to."

The complaining witness was forcibly removed from her automobile, manhandled, and forcibly taken to a park approximately 2 miles away. We do not agree that this is an insubstantial movement of the victim, as suggested by the defendant. While it may be true that the ultimate objective was the crime of rape, this is of no moment. The purpose of kidnapping in every instance is to make

it possible to commit some other crime. Its very nature therefore embraces other crimes as well as that of kidnapping. The penalties of kidnapping are intentionally more severe than the other crimes which may be included because of the consequences which often result from its perpetration. See State v. Tatreau, 176 Neb. 381, 126 N. W. 2d 157.

Defendant's sixth assignment of error is grounded on his contention that an accomplice, William Cayou, falsely testified that no consideration had been promised him for his testimony. This issue was injected by the defendant on his motion for a new trial on the grounds of newly discovered evidence. This evidence concerned some notes written by Cayou to a Charlene Earth while both of them were confined in the county jail. In this respect, we observe that the defendant had been told by Charlene Earth of her conversation with Cayou before his trial, and while defendant may not have had possession of the notes at the time of his trial, he was in possession of the information that Cayou was claiming he had made some type of a deal and was going to testify for the State.

There is no contention and certainly no evidence that the prosecution knowingly used perjured testimony. Even if we were to read into the inferences defendant wishes to make the finding that Cayou committed perjury, which we are unable to do, we still would have no evidence of the knowing use of perjured testimony by the prosecution. More important, however, we believe the evidence falls far short of showing that any deal was made with Cayou by the prosecution for his testimony. Giving the evidence

adduced on the motion every possible inference, it does not go to the question of the truth or falsity of Cayou's testimony, but rather only to the question of Cayou's motive in testifying. It was purely a collateral issue, not having to do with the guilt or innocence of defendant. Its only purpose would be to impeach or discredit the witness.

This court has frequently said that impeaching evidence is not a proper basis for a new trial. See Rains v. State, 173 Neb. 586, 114 N. W. 2d 399, and Fugate v. State, 169 Neb. 434, 99 N. W. 2d 874, in which we said: "It is the rule that a new trial will not be granted on the ground of newly discovered evidence when the only effect of the evidence is to impeach or discredit a witness."

Defendant's last assignment of error alleges that he was denied the effective assistance of counsel because of counsel's consumption of intoxicants. Defendant's counsel was not court appointed but was retained counsel of defendant's own choice. There is no doubt that during the course of the trial, particularly after lunch, defendant's counsel had the odor of liquor on his breath. It is also undisputed that counsel had represented defendant and his family on other occasions and they knew that he used alcoholic liquors during the day. There is nothing apparent from the record which would indicate counsel became so incapacitated that he could not adequately conduct defendant's defense. The evidence falls far short of any indication that counsel's propensity prevented a fair trial. The most it indicates is that counsel consumed liquor on occasions when he was not in court. In any event, this court is not in as good a position as the trial

court to decide the issue. The trial court had the opportunity to observe counsel, and was in a position to know whether counsel's drinking affected his ability to adequately represent the defendant. It is a fact question on which we accept the finding of the trial court. However, we are convinced that if defendant's counsel had come to court so far under the influence of alcoholic liquor that he could not effectively represent the defendant, the trial court would have immediately postponed the trial and held counsel in contempt of court.

As the Eighth Circuit Court of Appeals observed in Hanger v. United States, 428 F. 2d 746: "'* * * a charge of inadequate representation can prevail "only if it can be said that what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the Court."'" Defendant's showing falls far short of even suggesting this possibility.

Defendant injects the argument that the State of Nebraska has lost jurisdiction over the defendant by reason of retrocession. In 1953 Congress adopted 18 U. S. C. A., section 1162, which, so far as pertinent for discussion of the question raised, provides: "(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

"State or Territory of	Indian country affected
"Alaska	All Indian country within the Territory
"California	All Indian country within the State
"Minnesota	All Indian country within the State, except the Red Lake Reservation
"Nebraska	All Indian country within the State
"Oregon	All Indian country within the State,
"Wisconsin	All Indian country within the State." except the Warm Springs Reservation

In 1968 Congress provided for the voluntary retrocession of the jurisdiction granted by 18 U. S. C. A., section 1162, by passing 25 U. S. C. A., section 1323, which provides: "(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this Section.

"(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal. Pub. L. 90-284, Title IV, § 403, Apr. 11, 1968, 82 Stat. 79."

On April 16, 1969, the Nebraska Legislature adopted Legislative Resolution 37, which, so far as pertinent herein, reads: "Now, Therefore, Be It Resolved By The Members Of The Nebraska Legislature In Eightieth Session Assembled:

"1. That the State of Nebraska hereby retrocedes to the United States all jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska, acquired by the State of Nebraska pursuant to Public Law 280 of 1953, except as provided in paragraph 2 of this resolution.

"2. That the retrocession of jurisdiction contained in paragraph 1 of this resolution shall not apply to any offenses involving the operation of motor vehicles on public roads or highway.

"3. That the Executive Board of the Legislative Council is hereby authorized and directed to take all necessary action to put this resolution into effect, such action to include arrangements with the Department of the Interior and the department's Bureau of Indian Affairs concerning the assumption of law enforcement responsibilities in the area of Indian country covered by this resolution."

By Executive Order dated November 21, 1968, the Secretary of the Interior was authorized to accept any retrocession of jurisdiction which was to be effected by publication in the Federal Register. On October 24, 1970, the Secretary caused the following notice to be published in the Federal Register: "Pursuant to the authority vested in the Secretary of Interior by Executive Order No. 11435 (33 F. R. 17339) I hereby accept, as of 12:01 A. M. EST, October 25, 1970, retrocession to the United States of all jurisdiction exercised by the State of Nebraska over offenses committed by or against

Indians in the areas of Indian country located within the boundaries of the Omaha Indian Reservation in Thurston County, Nebr. as follows: (Description boundaries omitted) except offenses involving the operation of motor vehicles on public roads or highways which retrocession was tendered and offered by Legislative Resolution No. 37 passed by the Legislature of Nebraska in 80th Regular Session on the 16th day of April, 1969.

"Walter J. Hickel
Secretary of the Interior."

It is to be noted that the Nebraska Legislative Resolution was to retrocede all jurisdiction over offenses committed by or against Indians in the Indian country located in Thurston County acquired by the State pursuant to Public Law 280 of 1953, except traffic offenses. In the discussion on Legislative Resolution 37, the statement is made that the Commissioner of Indian Affairs had approved the Resolution and had agreed to accept retrocession of all Indian territory in Thurston County, which includes both the Omaha and Winnebago Tribes. The acceptance by the Secretary of the Interior, however, is only a partial acceptance of retrocession of jurisdiction. It is specifically limited to the areas of Indian country located within the boundaries of the Omaha Indian Reservation in Thurston County. This definitely was not an acceptance of the retrocession offered, which was all of the Indian territory in Thurston County, and in our judgment is completely unauthorized by the terms of Resolution of the Nebraska Legislature, and so does not constitute an acceptance. The difficulties apparent in trying to exercise jurisdiction in only a part of the

Indian territory in Thurston County, which includes both Winnebago and Omaha Indians, are so patent as not to need elaboration. The Nebraska Legislature recognized this problem, and manifested its unwillingness to accept the counter proposal.

On February 1, 1971, the Nebraska Legislature adopted Resolution 16, which provides: "Whereas, the Eightieth Session of the Nebraska State Legislature, 1969, adopted Legislative Resolution 37, relating to the retrocession to the United States of jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska, acquired by the State of Nebraska pursuant to Public Law 280 of 1953; and

"Whereas, the United States has not accepted retrocession in accordance with the terms and provisions of said Legislative Resolution 37,

"Now, Therefore, Be It Resolved By The Members Of The Eighty-second Legislature of Nebraska, First Session:

"1. That the action of the Eightieth Session of the Nebraska State Legislature, 1969, approving Legislative Resolution 37 is rescinded, and the offer of retrocession therein contained is withdrawn.

"2. That a duly attested copy of the resolution be transmitted by the Clerk of the Legislature to the Secretary of Interior of the United States."

In our judgment, the original resolution of retrocession could not be effective until it was accepted by the federal government. A partial acceptance is not effective

unless and until it is approved by the State. The determination of the extent of retrocession was left to the states by 25 U. S. C. A., section 1323, since the United States is authorized to accept all or any measure of retrocession. The measure of jurisdiction to be retroceded was a matter for the state to determine, and is not dictated in any way by the federal act. The attempted acceptance was not in accordance with the terms of the offer, and was therefore of no force and effect. The offer of retrocession having been withdrawn, 18 U. S. C. A., Section 1162, is still applicable in Nebraska.

Having reached the conclusion that retrocession never became effective, it is unnecessary to discuss the questions raised by the parties to be considered in the event we had found retrocession to be effective.

For the reasons given above, the conviction of the defendant on both Counts I and II is affirmed. The penalty on Count I is reduced from life imprisonment to a term of 35 years. The judgment entered is affirmed in all particulars except as noted above.

AFFIRMED AS MODIFIED.

McCown, J.

I concur in the affirmance of the convictions. I do not concur in the later disposition.

APPENDIX NO. 5

In the United States District Court
For the District of Nebraska

DENNIS TYNDALL,

Petitioner,

vs.

CHARLES WOLFF,

Respondent.

ORDER

(Filed May 26, 1972)

CV71-L-366

In accordance with the accompanying memorandum,

IT HEREBY IS ORDERED that the petition for a writ of habeas corpus is granted and that the petitioner Dennis Tyndall be released from the custody of the respondent Charles L. Wolff, Jr.

Dated May 26, 1972.

BY THE COURT

WARREN K. URBOM, *Chief Judge*

I certify this to be a true copy of the original record in my custody, filed May 26, 1972. RICHARD C. PECK, CLERK, By /s/ Winnie O. Nichols, Deputy Clerk.

In the United States District Court
For the District of Nebraska

WAYNE GOHAM,

Petitioner,

vs.

CHARLES WOLFE,

Respondent.

ORDER

(Filed May 26, 1972)

CV71-L-365

In accordance with the accompanying memorandum,

IT HEREBY IS ORDERED that the petition for a writ of habeas corpus is granted and that the petitioner Wayne Goham be released from the custody of the respondent Charles L. Wolff, Jr.

BY THE COURT

WARREN K. URBOM, *Chief Judge*

I certify this to be a true copy of the original record in my custody, filed May 26, 1972. RICHARD C. PECK, CLERK, By /s/ Winnie O. Nichols, Deputy Clerk.

In the United States District Court
For the District of Nebraska

WAYNE GOHAM,

Petitioner,

vs.

CHARLES WOLFE,

Respondent.

DENNIS TYNDALL,

Petitioner,

vs.

CHARLES WOLFF,

Respondent.

MEMORANDUM

(Filed May 26, 1972)

CV71-L-365
CV71-L-366

APPEARANCES: For petitioners, William G. Line

For respondent, Ralph H. Gillan, Assistant Attorney General

WARREN K. URBOM, Chief Judge

The petitioners, Wayne Goham and Dennis Tyndall, have applied for writs of habeas corpus in this court, contending that their present incarceration in the Nebraska Penal and Correctional Complex is contrary to the Constitution and laws of the United States. Both applications present identical questions of law, and this memorandum will be equally applicable to both cases.

The petitioners are both enrolled members of the Omaha Tribe of Indians. Both were, prior to their incarceration, residents of the Omaha Indian Reservation in Thurston County, Nebraska.

They are presently incarcerated pursuant to judgments of conviction entered in the District Court of Thurston County. Goham was convicted of kidnapping and rape and was sentenced to life imprisonment on the kidnapping charge and a term of 3 to 20 years on the rape charge, the sentences to run concurrently. On appeal the convictions were affirmed, but the sentence for kidnapping was modified to a term of 35 years. *State v. Goham,* 187 Neb. 35, 187 N. W. 2d 305 (1971). Tyndall was convicted of kidnapping, rape, and being an habitual criminal. He was sentenced to life imprisonment on the kidnapping count, a term of 20 years for the rape conviction, and 10 years on the habitual criminal charge. The sentences are to be served consecutively. On appeal the Supreme Court of Nebraska modified the kidnapping sentence to a term of 35 years and vacated the sentence on the charge of being an habitual criminal. *State v. Tyndall,* 187 Neb. 48, 187 N. W. 2d 298 (1971).

Goham's trial was completed in March of 1970. The Tyndall trial was completed on October 15, 1970. As of October 24, 1970, Goham's appeal was pending and Tyndall filed an appeal shortly thereafter.

This is not the petitioners' first appearance in this court. An earlier declaratory judgment action was dismissed without resolution on the merits. *Tyndall v. Ideyer,* Civ. 1817 L (unreported memorandum and order, U. S. D. C. Neb. 1971). The habeas corpus petitions here under consideration were earlier dismissed without prejudice for failure to exhaust available state remedies. Subsequently the petitioners sought leave to docket original petitions for writ of habeas corpus in the Supreme Court

of Nebraska, but leave was denied by that court. Whether this be construed as a waiver by the state court of the exhaustion requirement, *Blackwell v. Sigler*, — F. 2d — (C. A. 8th Cir. 1972), or as having accomplished exhaustion, *Wilwording v. Swenson*, 404 U. S. 249 (1971), it is apparent that the matter is ready for resolution on the merits.

Although the somewhat complex factual setting of this case has been set forth in earlier memoranda, it would be helpful to review briefly the uncontested facts.

In 1953 the State of Nebraska, pursuant to 18 U. S. C. § 1162(a), began to exercise exclusive criminal and civil jurisdiction over the Omaha and Winnebago Tribes located on reservations in Nebraska. No affirmative action was required by the state for the assumption of jurisdiction. *Anderson v. Gladden*, 293 F. 2d 463 (C. A. 9th Cir. 1965), cert. denied 368 U. S. 947; *Robinson v. Wolff*, — F. Supp. — (U. S. D. C. Neb. 1972). Title 25 U. S. C. § 1323-(a), effective in 1968, authorized the United States to accept a retrocession by any state of "all or any measure of the criminal or civil jurisdiction . . . acquired by such State pursuant to the provisions of section 1162 of Title 18 . . ."

On April 16, 1969, the Nebraska Legislature passed Legislative Resolution 37, which stated in pertinent part:

> "That the State of Nebraska hereby retrocedes to the United States all jurisdiction over offenses committed by or against Indians in the areas of Indian Country located in Thurston County, Nebraska . . . [except] offenses involving the operation of motor vehicles on public roads or highways."

This offer of retrocession was in part accepted by the Secretary of the Interior, as authorized by Executive Order No. 11435. Jurisdiction over the Omaha Indian Tribe was accepted, while jurisdiction over the Winnebago Tribe was declined, thereby remaining with the State of Nebraska. The Secretary's acceptance was published in the Federal Register on October 24, 1970, and became effective on October 25, 1970, at 12:01 a. m. EST. On February 1, 1971, the Nebraska Legislature purported to withdraw the offer of retrocession by passage of Legislative Resolution No. 16. 1/

A challenge of the jurisdiction of the State of Nebraska to pronounce final judgment against the petitioners was presented to the Nebraska Supreme Court on direct appeal. The challenge was rejected, the court saying:

> "In our judgment, the original resolution of retrocession could not be effective until it was accepted by the federal government. A partial acceptance is not effective unless and until it is approved by the State. The determination of the extent of retrocession was left to the states by 25 U. S. C. A., section 1323, since the United States is authorized to accept all or any measure of retrocession. The measure of jurisdiction to be retroceded was a matter for the state to determine, and is not dictated in any way by the federal act. The attempted acceptance was not in accordance with the terms of the offer, and was therefore of no force and effect. The offer of retrocession having been withdrawn, 18 U. S. C. A., section 1162, is still applicable in Nebraska."
>
> *State v. Goham*, 187 Neb. at 47.

One possible interpretation of § 1323(a) is that the term "all or any measure" meant that the jurisdiction

to be retroceded was to be determined by the state, and the Secretary was vested with no discretion; he could accept only what was offered. This is the interpretation obviously adopted by the Supreme Court of Nebraska. Another possible interpretation is that the Secretary had discretion to accept all or any measure of that which was offered by the State. This, judging from the acceptance set forth by the Secretary at 35 F. R. 16598, was the interpretation given the statute by the Secretary of the Interior.

It thus becomes obvious that two differing interpretations have been placed on § 1323(a), one by the Supreme Court of Nebraska, the other by the Secretary of the Interior, and each interpretation leads to a different result.

When a right under a federal statute or the Constitution of the United States is being determined in habeas corpus, the interpretation given by a state court is not a final determination of those rights. *Townsend v. Sain*, 372 U. S. 293, 319 (1963). By the same token, a state court cannot deny enforcement of rights arising under federal law simply because the rights are in conflict with a doctrine of state law or the public policy of the state. *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1 (1912); *McKnett v. St. Louis & S. F. Ry. Co.*, 292 U. S. 230 (1934); *Testa v. Katt*, 330 U. S. 386 (1947) This leads to the conclusion that the final determination of an individual's rights under the United States laws or Constitution must rest in the federal courts. Cf. *Townsend v. Sain*, supra.

In determining the governing interpretation of § 1323, a federal court should be guided to some degree by the

interpretation given by the Secretary of the Interior, the official charged with the duty of executing the statute. The measure of the guidance is articulated in *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission,* 395 U. S. 367, 381 (1969):

> " . . . [T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, . . ."

See also *Zemel v. Rusk,* 381 U. S. 1 (1962); *Udall v. Tallman,* 380 U. S. 1 (1965); *Lewis v. Martin,* 397 U. S. 552 (1970).

It would appear to be the policy of § 1323, when read in conjunction with contemporaneous legislation that was a part of the Civil Rights Act of 1968, that full effect be given to the wishes of the Indians in determining whether they would be subject to state or federal jurisdiction. In determining policy of a statute the entire statute should be considered. *Mastro Plastics Corp. v. Labor Board,* 350 U. S. 270 (1956). The statute should be construed so as to give effect to the policy expressed. *Addison v. Holly Hill Co.,* 322 U. S. 607, 617 (1944); *Vermilya-Brown Co. v. Connell,* 335 U. S. 377, 390 (1948). The construction given by the Secretary is most nearly in accordance with the policy of the act as a whole, as it gave effect to the wishes of the individual tribes involved. *Omaha Tribe of Indians v. Village of Walthill,* — F. Supp. — (U. S. D. C. Neb. 1971).

I find no compelling indication that the construction given § 1323(a) by the Secretary is wrong. Therefore, it is my judgment that jurisdiction over crimes committed by or against Omaha Indians within the confines of the

Omaha Indian Reservation vested in the United States as of 12:01 a. m. EST on October 25, 1970. Cf. *Menominee Tribe v. United States,* 391 U. S. 404 (1968). Legislative Resolution 16, which purported to withdraw the offer of retrocession, was of no effect. This view is in full accord with the resolution of the question made earlier by Judges Denney and Robinson of this district in *United States v. Brown,* 334 F. Supp. 536 (U. S. D. C. Neb. 1971) and *Omaha Tribe of Indians v. Village of Walthill,* supra. See also *Hollister v. United States,* 145 F. 773 (C. A. 8th Cir. 1906).

It is now necessary to determine the effect of a valid retrocession on the petitioners' convictions.

Legislative Resolution 37 contained no provision for saving pending prosecutions. It is a violation of an individual's right to due process of law to be sentenced to imprisonment by a court which has no jurisdiction to do so. *In re Kelley,* 46 F. 653 (C. C. D. Ore. 1890); cf. *Central of Georgia Ry. Co. v. Mayor, City of Macon,* 110 F. 865 (C. C. S. D. Ga. 1901). Although a judgment of conviction was entered by the District Court of Thurston County prior to the retrocession of jurisdiction, their appeals had not been determined. Loss of jurisdiction between trial and conclusion of appeal voids the proceedings in the absence of an express provision saving pending cases. *Forsyth v. United States,* 90 How. (50 U. S.) 570 (1850); *Ex Parte McArdle,* 7 Wall. (74 U. S.) 506, 514 (1868); *Sherman v. Grinnell,* 123 U. S. 679 (1887); *Wilkinson v. Nebraska,* 123 U. S. 286 (1887); *Railroad Co. v. Grant,* 8 Otto (98 U. S.) 398, 401 (1878); *Hallowell v. Commons,* 239 U. S. 506, 508 (1916); *Gwin v. United States,* 184 U. S. 669, 675 (1902); *De LaRama S. S. Co. v. United*

States, 344 U. S. 386, 390 (1953). More directly applicable to the present facts is the case of *United States v. Chambers,* 291 U. S. 217 (1934). Chambers was convicted of conspiring to violate the National Prohibition Act. He then filed a plea in abatement, contending that the repeal of the Eighteenth Amendment deprived the court of jurisdiction to entertain further proceedings. The plea was sustained by the district court and the government appealed. In affirming the district court, the United States Supreme Court said:

> "... The continuance of the prosecution of the defendants after the repeal of the Eighteenth Amendment, for a violation of the National Prohibition Act alleged to have been committed in North Carolina, would involve an attempt to continue the application of the statutory provisions after they had been deprived of force. This consequence is not altered by the fact that the crimes in question were alleged to have been committed while the National Prohibition Act was in effect. The continued prosecution necessarily depended upon the continued life of the statute which the prosecution seeks to apply. In case a statute is repealed or rendered inoperative, no further proceedings can be had to enforce it in pending prosecutions, unless competent authority has kept the statute alive for that purpose."
>
> 291 U. S. at 222-3.

The court noted the absence of a savings clause in the Twenty-first Amendment, then noted that "[t]he Congress might have proposed the Amendment with such a savings clause, but it did not." 291 U. S. at 224.

Finally, the court noted at 226:

> ". . . Prosecution for crimes is but an application or enforcement of the law, and if the prosecution continues the law must continue to vivify it. The law, here sought to be applied, was deprived of force by the people themselves as the inescapable effect of their repeal of the Eighteenth Amendment. The principle involved is thus not archaic but rather is continuing and vital,—that the people are free to withdraw the authority they have conferred and, when withdrawn, neither the Congress nor the courts can assume the right to continue to exercise it."

The people of Nebraska, through their legislature, chose to retrocede to the United States jurisdiction over the Indian tribes. It was open to them to provide for the savings of pending prosecutions. They did not choose, for whatever reasons, to do so. With the loss of jurisdiction the courts of Nebraska lost the power to pronounce final judgment on these petitioners.

In a case similar to this one the United States District Court for the District of South Dakota ordered the release of Van Moore, an Indian who had been convicted of murder by the state court of South Dakota. Finding that exclusive jurisdiction of the crime of murder committed by an Indian in Indian country was in the United States, Judge Elliot ordered that the writ of habeas corpus be granted and Van Moore be released from confinement. *Ex Parte Van Moore,* 221 F. 954 (U. S. D. C. S. D. 1915).

I therefore find that the State of Nebraska effectively retroceded to the United States jurisdiction over all crimes, except for violations of traffic laws on public highways and roads, committed by or against Indians in Indian country. The acceptance on October 24, 1970, by the Secretary of Interior effectively vested in the United States

exclusive jurisdiction over crimes committed by or against Omaha Indians within the territorial limits of the Omaha Indian Reservation and deprived the courts of Nebraska of jurisdiction as of 12:01 a. m. EST on October 25, 1970. The retrocession was accomplished prior to the finality of judgments of conviction of the petitinoers and at a time when the State of Nebraska was powerless to pronounce such judgments. The present confinement of the petitioners is in violation of the Constitution of the United States and they must therefore be released.

An appropriate order will be entered.

Dated May 26, 1972.

BY THE COURT

WARREN K. URBOM, *Chief Judge*

Footnote 1/ During the course of the hearings on this and other related cases, there was evidence to the effect that Legislative Resolution 37 was never presented to the Governor of Nebraska for his signature, as required by Nebraska law. I am persuaded that this is of no effect, even though Legislative Resolution 37 may be totally invalid to accomplish any state purposes. Title 25 U. S. C. § 1323 is silent as to the means by which retrocession is to be accomplished. In giving the Secretary of Interior the authority to accept offers of retrocession, Executive Order No. 11435 also gave the Secretary authority to determine what actions on the part of the state were necessary to accomplish retrocession. For the limited purpose of offering jurisdiction to the United States, Legislative Resolution 37 was sufficient evidence of the state's legislatively expressed intention to offer jurisdiction to the United States. This is not to say that the Secretary could, by his actions, give validity

to an act otherwise invalid under state law. It is only to say that the Secretary was within his discretion in accepting a portion of the jurisdiction offered by Legislative Resolution 37. It may be that Legislative Resolution 37 is totally invalid for state purposes. This is for the courts of Nebraska to decide. It is, however, sufficient for federal purposes. Cf. *Dier v. Sims*, 341 U. S. 22 (1951).

APPENDIX NO. 6

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BEVERLY MARIE BROWN, nee WOLFE,
Defendant.

Crim. No. 71-0-116

United States District Court,
D. Nebraska

Nov. 29, 1971

Defendant made motion for order dismissing criminal action against her on ground that federal Government was without jurisdiction over her for offenses charged. The District Court, Denney, J., held that assuming invalidity under state law of resolution passed by Nebraska Legislature ceding all criminal jurisdiction, save for traffic offenses, over two Indian reservations to the United States, federal interpretation of effectiveness of state action triggering reassertion of federal jurisdiction

was controlling and action of Secretary of Interior in assuming criminal jurisdiction over Omaha but not Winnebago Indian Reservations though resolution passed by Nebraska Legislature pertained to both Indian reservations, was within authority provided by the statute.

Defendant's motion to dismiss denied.

1. *Indians*

Federal government exercises plenary power over affairs of the Indian and that power of the federal government, when exercised, preempts state control over the field.

2. *Indians*

The federal Government, having plenary power over the Indians, had power to prescribe any method or event it desired to trigger its own resumption of control over Indian affairs within a state, and triggering event could have been devoid of any mention of state action at all. 18 U. S. C. A. § 1162; 28 U. S. C. A. § 1360; 25 U. S. C. A. §§ 9, 1323; Executive Order No. 11435, 25 U. S. C. A. § 1323 note.

3. *Indians*

Assuming invalidity under state law of resolution passed by Nebraska Legislature ceding all criminal jurisdiction save for traffic offenses, over two Indian reservations to the United States, in light of plenary power of federal government over Indian affairs, inescapable difficulty of requiring Secretary of Interior to delve into internal workings of the state government, and reliance of federal government upon what appeared to have been a

valid state action, federal interpretation of effectiveness of state action triggering reassertion of federal jurisdiction was controlling and term "retrocession" as determined by Secretary of Interior was fulfilled by action state took in the resolution. 18 U. S. C. A. § 1162; 28 U. S. C. A. § 1360; 25 U. S. C. A. §§ 9, 1323; Executive Order No. 11435, 25 U. S. C. A. § 1323 note; Const. Neb. art. 4, § 15; U. S. C. A. Const. Amend. 19.

See publication Words and Phrases for other judicial constructions and definitions.

4. *Indians*

"Retrocession" of jurisdiction over Indian reservation by state to United States government does not imply any particular procedure or action on part of the state involved. 18 U. S. C. A. § 1162; 28 U. S. C. A. § 1360; 25 U. S. C. A. §§ 9, 1323; Executive Order No. 11435, 25 U. S. C. A. § 1323 note.

5. *Statutes*

Where language used in a statute is ambiguous, recourse should be had to legislative purposes.

6. *Indians*

Under statute authorizing United States to accept retrocession by any state of all or any measure of criminal or civil jurisdiction acquired by state over Indian country. United States might assume all or any measure of the jurisdiction retroceded by a state as well as allowing state to offer all or any measure of civil or criminal jurisdiction acquired by it. 18 U. S. C. A. § 1162; 28

U. S. C. A. § 1360; 25 U. S. C. A. §§ 9, 1323; Executive Order No. 11435, 25 U. S. C. A. § 1323 note.

7. *Indians*

Under statute authorizing United States to accept retrocession by state of all or any measure of jurisdiction transferred to state over Indian country within the state, action of Secretary of Interior in assuming criminal jurisdiction over Omaha but not Winnebago Indian Reservations though resolution passed by Nebraska Legislature pertained to both Indian reservations, was within authority provided by the statute. 18 U. S. C. A. § 1162; 28 U. S. C. A. § 1360; 25 U. S. C. A. §§ 9, 1323; Executive Order No. 11435, 25 U. S. C. A. § 1323 note.

William K. Schaphorst, Asst. U. S. Atty., Nebraska, for plaintiff.

George A. Penry, Omaha, Neb., for defendant.

MEMORANDUM

DENNEY, District Judge.

This matter comes before the Court on the motion of defendant for an order dismissing this criminal action against her on the ground, among others, that the federal government is without jurisdiction over her for the offenses charged. This memorandum considers only the jurisdictional issue raised by defendant's motion and reserves ruling upon the remainder of her motion until additional hearing can be had upon defendant's assertions therein.

Defendant is an American Indian, a member of the Omaha Indian Tribe, and the crimes she is charged to have committed allegedly occurred upon the Omaha Indian Reservation, located primarily in Thurston County, Nebraska.

The charges against defendant arise out of a stabbing incident wherein her sister, Clover Wolfe, was critically injured. These alleged crimes constitute felonies.

Initially, the Court wishes to express appreciation for the diligence of counsel in thoroughly briefing the many legal questions raised in the issue of federal jurisdiction.

The question of the existence of federal jurisdiction over the Omaha Indian Reservation primarily within Thurston County, Nebraska, rests upon the validity and finality of retrocession of jurisdiction by the State of Nebraska to the United States Government after approximately sixteen years of nearly exclusive state control.

In 1953, the Congress transferred all jurisdiction, civil[1] and criminal[2], over the Indian country within the State of Nebraska to the state. At that time, similar withdrawal of federal jurisdiction over the Indian country within other states was also accomplished. The action of Congress in placing jurisdiction over Indians in the hands of the states had as its purpose the elimination of the legal impediments standing in the way of the Indian becoming a first class citizen.[3] Congress apparently as-

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1. 67 Stat. 589, 28 U. S. C. § 1360.

2. 67 Stat. 588, 18 U. S. C. § 1162.

3. H. R. Rep. No. 848, 83d Cong., 1st Sess. (1953). S. Rep. No. 699, 83d Cong., 1st Sess. (1953).

sumed that subjecting the Indian to equality of the responsibilities of state law would make him equal in all respects to other citizens of the state.

In 1968, the Congress authorized the United States to take back, via retrocession from Nebraska "all or any measure" of the jurisdiction transferred to the state in 1953.[4] On November 12, 1968, President Lyndon B. Johnson, by executive order,[5] pursuant to statutory authority,[6] designated the Secretary of Interior to exercise the authority granted by the retrocession statute.

In 1969, the Eightieth Session of the Nebraska Legislature passed Legislative Resolution 37, which ceded all criminal jurisdiction, save for traffic offenses, over the two Indian reservations primarily in Thurston County, Nebraska, to the United States.[7] The Secretary of Interior took jurisdiction over the Omaha Indian Reservation but did not take jurisdiction over the Winnebago Indian Reservation. This assumption of criminal jurisdiction over the Omaha Indians only was published in the Federal Register.[8]

In 1971, the Eighty-Second Legislature of Nebraska passed Legislative Resolution 16, wherein it attempted to cancel its cession of jurisdiction because the United States had not taken back all of the jurisdiction set forth in the

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4. 82 Stat. 79, 25 U. S. C. § 1323. See Appendix A.

5. Executive Order No. 11435, 33 F. R. 17339. See Appendix B.

6. 4 Stat. 738, 25 U. S. C. § 9.

7. See Appendix C.

8. 35 F. R. 16598. See Appendix D.

resolution ceding jurisdiction over both tribal reservations.[9]

Two issues arise in relation to the validity of retrocession of jurisdiction to the federal government. First, Resolution 37 was not presented to the governor for his signature and therefore might be invalid under state law. Second, the question has been raised as to the authority of the Secretary of Interior to take back jurisdiction over only one of the reservations retroceded by the state, while rejecting the assumption of jurisdiction over the other.

THE EFFECT OF THE INVALIDITY OF RESOLUTION 37 UPON FEDERAL JURISDICTION

Article IV, Section 15, of the Constitution of the State of Nebraska[10] would seem to require that a resolution such as Resolution 37 be presented to the Governor for his signature. Resolution 37 was not presented to the Governor of Nebraska, although it appears valid in all other respects.

In the advisory opinion of In re Contest Proceeding,[11] the Nebraska Supreme Court considered the validity of a joint resolution of the Nebraska House and Senate calling a joint meeting of the houses to conduct an election contest as to the offices of the governor and lieutenant governor, among other state officers. The Court held that such a resolution was required by substantially the

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9. See Appendix E.

10. See Appendix F.

11. 31 Neb. 262, 47 N. W. 923 (1891).

same constitutional provision as now in effect, to be presented to the governor. The Court considered the resolution invalid.

The general tenor of other cases dealing with the above constitutional provision is that the governor constitutes a part of the legislative process in relation to the presentation of legislative matters to him.

The Court believes, under state law, the resolution would be held invalid. It is possible, however, considering the effect such a ruling would have upon the resolutions of recent decades, many of which have not been so presented, that the Nebraska Court would not so interpret the language of Article IV, section 15.

Assuming the invalidity of Resolution 37 under state law, the effect of such invalidity upon the retrocession of jurisdiction over the Indian country in Thurston County now becomes a determinative issue.

The effect of the invalidity of Resolution 37 could be considered either under state or federal law. The question of which law should be used to determine its effect is peculiarly difficult, since this precise issue has not before arisen in the courts of this land. Perhaps analogy to the somewhat similar area of interstate compacts is appropriate. It should initially be noted that compacts law deals essentially with the specialized law of *contracts* between sovereigns, which is not particularly analogous to the situation presented here. Compacts involve negotiations and the final negotiated agreement as to territorial activities, generally of a continuing nature. What is analogous as between compacts and the problem here

presented is the effect of the internal action of a state *externally,* and its impact upon the decisions and activities of other governments.

In the case of Dyer v. Sims,[12] the United States Supreme Court was faced with the problem of a West Virginia Supreme Court decision holding that the state legislature had exceeded its constitutional authority in entering into an interstate compact to control pollution upon the Ohio River system.

It was asserted in that case that the decision of the state court was controlling upon the issue of the interpretation of the state constitution and, thus, the validity of West Virginia's participation in and entry into the compact.

The Supreme Court of the United States held that the over-all validity of the compact was to be determined by federal law. The Court went on to interpret the state constitution under federal law. In the present action, interpretation of the state constitution is not necessary, but the principle of applying federal law to the questions there raised has analogous application here.

Much closer to the point now at issue is the situation in Leser v. Garnett.[13] The United States Supreme Court applied federal law to a determination of the effect of the invalidity under state law, of the ratification by the state legislatures of Tennessee and West Virginia of

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12. 341 U. S. 22, 71 S. Ct. 557, 95 L. Ed. 713 (1951).

13. 258 U. S. 130, 42 S. Ct. 217, 66 L. Ed. 505 (1922).

the Nineteenth Amendment to the United States Constitution.

But *Leser* has much broader application to the outcome of the present action than merely to exist as authority for the proposition that federal law should be applied to determine the effect of the invalidity of Resolution 37 upon the validity of retrocession. The Court there noted that where the Secretary of State of the United States had received "official notice * * * duly authenticated * * *" that the two states involved had ratified the proposed amendment, it "was conclusive upon him, and being certified to by his proclamation, is conclusive upon the courts."[14]

In respect to Resolution 37, the Secretary of Interior received duly authenticated copies thereof and, in reliance thereon, acted to cause assumption of jurisdiction by the federal government over the Omaha Indian Reservation.[15] This Court can see no logical distinction between the two situations.

However, even without the authority of *Leser*, this Court would still be compelled to hold that the effect of noncompliance with Article IV, Section 15, of the Nebraska Constitution has no effect upon the assumption of federal jurisdiction by the Secretary of Interior.

[1] The federal government exercises plenary power over the affairs of the Indian[16]. Very similar to the tra-

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14. Id. at 137, 42 S. Ct. at 218.

15. See Filing No. 42.

16. **See e. g.** 42 C. J. S. Indians § 70a, pp. 775-779.

ditional "commerce power" although broader in scope, this power of the federal government, when exercised, preempts state control over the field[17].

Questions of momentous impact upon the exercise of federal jurisdiction are at issue here. The Secretary of Interior was presented with what purported to be a valid state "retrocession" of jurisdiction over the Indian country in Thurston County, Nebraska. The question arises as to whether the Secretary must look into the prima facie valid act of a state to determine its validity under state law before he may rely upon it in precipitating federal action. Obviously, such a rule would lead to endless delay and the hazard, in every federal response to state action, that such reliance might, due to the improper conduct of the state officials, be deemed a nullity at a future date. Somewhere along the line, if only for the purpose of finality, such a result cannot be found. Here, the federal government, relying upon what purported to be valid state action, has expended large sums of money and manpower on the Omaha Reservation. It is significant to note the extent to which the valid appearance of Resolution Number 37 has carried itself in the scant two years since its conception.

In State v. Goham[18] and State v. Tyndall[19], the Nebraska Supreme Court determined that retrocession was not accomplished due to the fact that the Secretary of In-

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17. Anderson v. Gladden, 293 F. 2d 463 (9th Cir. 1961), cert. denied, 368 U. S. 949, 82 S. Ct. 390, 7 L. Ed. 2d 344.

18. 187 Neb. 35, 187 N. W. 2d 305 (1971).

19. 187 Neb. 48, 187 N. W. 2d 298 (1971).

terior had not taken back jurisdiction of both reservations in Thurston County. The effect of Resolution 16 in those two cases was held to be a withdrawal of the proposed retrocession of Resolution 37. The Nebraska Court held that Resolution 16 was effective in withdrawing retrocession without discussing the fact that Resolution 16 was not presented to the governor either. Thus, the issue apparently was overlooked by the Nebraska Supreme Court.

Obviously, the requirements of Article IV, Section 15, were overlooked by the Nebraska Legislature.

This Court takes judicial notice of the fact that the executive branch of the state government in its proceeding before Chief Judge Robinson failed to raise the issue of the validity of the resolution[20]. The Court there, as here, raised the issue *sua sponte*.

The fact that not one of the three branches of the government of Nebraska recognized the possible problem with the resolution indicates the tremendous difficulty which a rule of law requiring the federal government to delve into the procedural validity of state action would place upon any state-precipitated federal response.

It is also apparent that the Congress had determined, after sixteen years of state control that the Indians had, indeed, not become the "first class citizens" that the withdrawal of federal control was supposed to foster.

[2] The federal government, having plenary power over Indians, had the power to prescribe any method or

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20. Omaha Tribe of Nebraska v. Village of Walthill, 334 F. Supp. 823 (D. Neb. 1971).

event it desired to trigger its own re-assumption of control over Indian affairs within a state. In fact, the triggering event could have been devoid of any mention of state action at all.

[3, 4] The plenary power of the federal government over Indian affairs, the inescapable difficulty of requiring the Secretary to delve into the internal workings of the state government, and the reliance of the federal government upon what appeared to have been a valid state action, are all factors to be considered and lead the Court to the conclusion that the federal interpretation of the effectiveness of state action triggering the re-assertion of federal jurisdiction is and was controlling. "Retrocession" does not imply any particular procedure or action on the part of the states involved and the need for finality and importance of the various competing interests here dictates that the state action presented complies with the federal requirements of "retrocession."

The federal government, having the power to preempt jurisdiction over the Omaha Reservation, had the power to so define and construe the word "retrocession" as to remove from the determination of federal assumption of jurisdiction any question of the procedural validity or invalidity of the state's act of retrocession. Considering the problems presented by any other holding, the Court holds that the term "retrocession," as determined by the Secretary of Interior, was fulfilled by such action as the state took in Resolution 37.

THE EFFECT OF THE ASSUMPTION OF JURISDICTION OVER ONE OF THE TWO RESERVATIONS IN THURSTON COUNTY

Subsection (a) of Title 25, Section 1323, U. S. C., reads as follows:

> (a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

Two readings logically can be given to the language of this statute. First, it might be read to provide that the state could give back all or any measure of the jurisdiction received in 1953, but that the United States was limited to taking back all or none. Second, it could provide flexibility for both the state and federal governments in allowing the state to give all or any measure of the jurisdiction it had received in 1953 and the federal government to take back all or any measure of the jurisdiction set forth in the resolution of the state legislature.

[5] As stated in Daniels v. United States[21], even if statutory language is unambiguous, if

> the literal words [of a statute] bring about [a result] "plainly at variance with the purpose of the legislation as a whole", legislative purpose is followed rather than the literal words • • •.

However, the Court finds the language of 25 U. S. C. A. § 1323 ambiguous and reasonably open to the two con-

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21. 210 F. Supp. 942, 949-950 (D. Mont. 1962), affirmed, 372 U. S. 704, 83 S. Ct. 1018, 10 L. Ed. 2d 124 (1963).

structions previously mentioned. Therefore, the rule set forth in Perry v. Commerce Loan Co.[22] applies. Where the language used in a statute is ambiguous, recourse should be had to "legislative purposes."

Unfortunately, from the voluminous debate centered around Public Law 90-284, no floor debate in either the Senate or House covered the effect of the retrocession statute. It is significant to note, however, that Public Law 90--284, of which the retrocession section was a part, is now primarily contained within Chapter 15 of Title 25, which is entitled "CONSTITUTIONAL RIGHTS OF INDIANS." A general discussion of the scope of Chapter 15 must note that Sub-chapter I deals basically with the extension to Indians of most of those basic rights provided for in the Bill of Rights to the United States Constitution. The tribe, in its government of tribal affairs, is now bound to observe those rights.

Subchapter II provides for the establishment of a model evidentiary code for Indian courts of justice to assure the basic rights of those accused of crimes and on trial therein.

Subchapter III concerns itself with jurisdiction over offenses committed by or against Indians in Indian country. Among other provisions, the subchapter requires that states not presently having jurisdiction may acquire civil[23] or criminal[24] jurisdiction over the Indian country

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22. 383 U. S. 392, 86 S. Ct. 852, 15 L. Ed. 2d 827 (1966).

23. 82 Stat. 79, 25 U. S. C. § 1322.

24. 82 Stat. 78, 25 U. S. C. § 1321.

within the state "*with the consent of the Indian tribe* occupying the particular Indian country or part thereof" over which jurisdiction is to be exercised [emphasis added]. The manner of obtaining such consent is by approval of the majority of enrolled adults of the tribe voting at a special election[25]. This sub-chapter also provides for retrocession by any state of jurisdiction to the United States[26].

Subchapter IV concerns the supplying of free legal counsel and Subchapter V concerns the updating and compilation of materials concerning the law dealing with Indians.

The review of this chapter clearly indicates that Congress intended to offer the Indian peoples a fair share of America's freedoms, privileges and responsibilities. The interests of the two governments involved should be considered, but the interests of the people most affected by these events should weigh heavily in a determination of what was intended by the language used in 25 U. S. C. A. § 1323. Specifically with reference to jurisdiction, it would be anomalous if Congress made provision for the assertion of the desires of Indians with reference to the consent requirements of §§ 1321 and 1322 but left the United States no method of considering those desires of individual tribes in No. 1323. If that section is not construed to give the United States the flexibility to choose between the assumption of jurisdiction over two different

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25. 82 Stat. 80, 25 U. S. C. § 1326.

26. 82 Stat. 79, 25 U. S. C. § 1323.

reservations within a state where the state retrocedes both to the federal government, then the desires of the individual Indian tribes could not be considered. In fact, that is precisely the situation involved in the Nebraska retrocession. The Winnebago Indians wished to remain under the criminal jurisdiction of the State of Nebraska[27]. The Omaha Indians wished to be returned to the criminal jurisdiction of the United States.[28] In order to further these desires, the Secretary of Interior, with the consent of the Legislative Council of the Nebraska Unicameral,[29] that body having been given the authority to deal with the federal government in relation to the effectuation of the retrocession by the explicit terms of Resolution 37, assumed criminal jurisdiction over the Omaha Reservation only, leaving the Winnebago Reservation to the state.

[6, 7] The overall purpose of Chapter 15 of Title 25 U. S. C. A. and, specifically, that subchapter dealing with jurisdiction, was to benefit the Indian. It surely was not to make the Indian a political ping-pong ball between the state and federal governments. For these reasons, the Court interprets the provisions of 25 U. S. C. A. § 1323 to mean that the United States may assume all or any measure of the jurisdiction retroceded by a state as well as allowing the state to offer all or any measure of the civil or criminal jurisdiction acquired in 1953. This means that the action of the Secretary of Interior in assuming criminal jurisdiction over the Omaha but not the Winne-

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27. See Filing No. 38 and attached exhibits in Criminal No 71-0-116.

28. Id.

29. Id.

bago Indian Reservation was within the authority provided by the statute.

Further weight is added to this position by the fact that this construction was given to the language of the statute by the Secretary of Interior.

The Supreme Court held in Udall v. Tallman,[30] dealing with construction of ambiguous executive orders that

> [t]he Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it. (cites omitted).

Again, at page 16 of that opinion, at page 801 of 85 S. Ct., the Court stated:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.

The interpretation given by the Secretary of Interior to this statute was quite clearly a reasonable one and should be given great weight in the determination of its meaning. *See* DeMarrias v. South Dakota.[31]

Also, as noted in Hopkins v. United States,[32] "statutes affecting the rights of Indians are generally to be construed in their favor. * * *." The rights of the Omaha Tribe as to any effect being given their desires would be

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30. 380 U. S. 1, 4, 85 S. Ct. 792, 795, 13 L. Ed. 2d 616 (1965).

31. 319 F. 2d 845 (8th Cir. 1963).

32. 414 F. 2d 464, 472 (9th Cir. 1969).

disregarded if the construction given § 1323 by the Secretary and this Court was rejected.

The Court therefore finds that the construction which most properly approaches the intent of Congress allows the state to retrocede all or any measure of the jurisdiction it acquired in 1953 and the United States to assume all or any measure of the jurisdiction retroceded by the state.

The nature of this determination was set forth by the esteemed Judge Learned Hand in United States v. Klinger,[33] wherein he wrote:

> When we ask what Congress "intended," usually there can be no answer, if what we mean is what any person or group of persons actually had in mind. Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion. He who supposes that he can be certain of the result is the least fitted for the attempt.

An order denying defendant's motion to dismiss for want of jurisdiction will be filed contemporaneously with this Memorandum.

APPENDIX A

82 Stat. 79, 25 U. S. C. § 1323.

> § 1323. Retrocession of jurisdiction by State. (a) The United States is authorized to accept a retrocession by any State of all or any measure of the

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33. 199 F. 2d 645 (2d Cir. 1952), affirmed, 345 U. S. 979, 73 S. Ct. 1079, 97 L. Ed. 1393 (1953).

criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588) as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

Pub. L. 90-284, Title IV, § 403, Apr. 11, 1968, 82 Stat. 79.

APPENDIX B

EXECUTIVE ORDER NO. 11435

Nov. 21, 1968, 33 F. R. 17339

DESIGNATING SECRETARY OF INTERIOR TO ACCEPT RETROCESSION OF JURISDICTION BY STATE

By virtue of the authority vested in me by section 465 of the Revised Statutes (25 U. S. C. § 9) [section 9 of this title] and as President of the United States, the Secretary of the Interior is hereby designated and empowered to exercise, without the approval, ratification, or other action of the President or of any other officer of the United States, any and all authority conferred upon the United States by section 403(a) of the Act of April 11, 1968, 82 Stat. 79 (25 U. S. C. § 1323(a)) [subsec. (a) of this section]: *Provided,* That acceptance of retrocession of all or any measure of civil or criminal jurisdiction, or both, by the Secretary hereunder shall be effected by publication in the FEDERAL REGISTER of a notice which shall specify the jurisdiction retroceded and the effective date

of the retrocession: *Provided further,* That acceptance of such retrocession of criminal jurisdiction shall be effected only after consultation by the Secretary with the Attorney General.

Lyndon B. Johnson

APPENDIX C

NEBRASKA LEGISLATIVE JOURNAL P. 1467

LEGISLATURE OF NEBRASKA
EIGHTIETH LEGISLATURE
FIRST SESSION

LEGISLATIVE RESOLUTION 37

Introduced by C. W. Holmquist, 16th District

WHEREAS, the State of Nebraska was given civil and criminal jurisdiction over Indians and Indian territory in this state by the Act of Congress of August 15, 1953, generally known as Public Law 280, and

WHEREAS, the assumption of such jurisdiction has led to steadily increasing costs for law enforcement in certain counties of Nebraska, and particularly in Thurston County; and

Whereas, because of restrictions in original grants of land in Thurston County to Indians and Indian tribes, Thurston County has not had a sufficient tax base to meet the increasing costs of law enforcement; and

WHEREAS, since 1957, state assistance has been provided for law enforcement purposes in Thurston County, and the cost of this assistance has increased each biennium; and

WHEREAS, Public Law 90-284 adopted as an Act of Congress on April 11, 1968, contains a number of provisions dealing with civil rights and jurisdiction of Indians; and

WHEREAS, Section 403(a) of Public Law 90-284 provides that the United States is authorized to accept a retrocession of all or any measure of the jurisdiction acquired by a state pursuant to Public Law 280 of 1953; and

WHEREAS, a committee of members of the Legislature appointed by the Executive Board of the Legislative Council following adoption of Public Law 90-284 has studied the problems of law enforcement in Indian areas of this state and the question of a retrocession of jurisdiction and has met with leaders of the Omaha and Winnebago tribes, county officials and officials of the Bureau of Indian Affairs.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NEBRASKA LEGISLATURE IN EIGHTIETH SESSION ASSEMBLED:

1. That the State of Nebraska hereby retrocedes to the United States all jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska, acquired by the State of Nebraska pursuant to Public Law 280 of 1953, except as provided in paragraph 2 of this resolution.

2. That the retrocession of jurisdiction contained in paragraph 1 of this resolution shall not apply to any offenses involving the operation of motor vehicles on public roads or highways.

3. That the Executive Board of the Legislative Council is hereby authorized and directed to take all necessary action to put this resolution into effect, such action to include arrangements with the Department of the Interior and the department's Bureau of Indian Affairs concerning the assumption of law enforcement responsibilities in the areas of Indian country covered by this resolution.

APPENDIX D

NOTICE OF ACCEPTANCE OF RETROCESSION OF JURISDICTION

35 F. R. 16598

Pursuant to the authority vested in the Secretary of the Interior by Executive Order No. 11435 (33 F. R. 17339), I hereby accept, as of 12:01 a. m., e. s. t., October 25, 1970, retrocession to the United States of all jurisdiction exercised by the State of Nebraska over offenses committed by or against Indians in the areas of Indian Country located within the boundaries of the Omaha Indian Reservation in Thurston County, Nebraska . . . except offenses involving the operation of motor vehicles on public roads or highways which retrocession was tendered and offered by Legislative Resolution No. 37 passed by the Legislature of Nebraska in 80th regular session on the 16th day of April, 1969.

* * * * *

/s/ Walter J. Hickel

Secretary of Interior

APPENDIX E

LEGISLATURE OF NEBRASKA
EIGHTY-SECOND LEGISLATURE
FIRST SESSION

LEGISLATIVE RESOLUTION 16
Introduced by C. W. Holmquist, 16th District

WHEREAS, the Eightieth Session of the Nebraska State Legislature, 1969, adopted Legislative Resolution 37, relating to the retrocession to the United States of jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska, acquired by the State of Nebraska pursuant to Public Law 280 of 1953; and

WHEREAS, the United States has not accepted retrocession in accordance with the terms and provisions of said Legislative Resolution 37.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE EIGHTY-SECOND LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the action of the Eightieth Session of the Nebraska State Legislature, 1969, approving Legislative Resolution 37 is rescinded, and the offer of retrocession therein contained is withdrawn.

2. That a duly attested copy of this resolution be transmitted by the Clerk of the Legislature to the Secretary of Interior of the United States.

/s/ Frank Marsh

President of the Legislature

I, Vincent D. Brown, hereby certify that the foregoing is a true and correct copy of Legislative Resolution 16, which was passed by the Legislature of Nebraska in Eighty-Second Legislature, First Session, on the first day of February, 1971.

/s/ Vincent D. Brown

Clerk of the Legislature

APPENDIX F

Article IV, Section 15, of the Constitution of the State of Nebraska, reads as follows:

> Sec. 15. Bills and resolutions to be presented to Governors approval; procedure; disapproval of items of appropriation. Every bill passed by the legislature, before it becomes a law, and every order, resolution or vote to which the concurrence of both Houses may be necessary (except on questions of adjournment) shall be presented to the Governor. If he approves he shall sign it, and thereupon it shall become a law, but if he do (sic) not approve, he shall return it with his objections to the house in which it shall have originated, which house shall enter the objections at large upon its journal, and proceed to reconsider the bill. If then three-fifths of the members elected agree to pass the same it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by three-fifths of the members elected to that house, it shall become a law, notwithstanding the objections of the governor. In all such cases the vote of each House shall be determined by yeas and nays, to be entered upon the journal. Any bill which shall not be

returned by the governor within five days (Sundays expected) (sic) after it shall have been presented to him, shall become a law in like manner as if he had signed it; unless the legislature by their adjournment prevent its return; in which case it shall be filed, with his objections, in the office of the secretary of state within five days after such adjournment, or become a law. The governor may disapprove any item or items of appropriation contained in bills passed by the legislature, and the item or items so disapproved shall be stricken therefrom, unless repassed in the manner herein prescribed in cases of disapproval of bills.

Note: The Nebraska Legislature has become a Unicameral since the enactment of the above section and a general amendatory constitutional provision specifies that wherever two houses are referred to, the reference should be changed to read a single house.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-366

VILLAGE OF WALTHILL, NEBRASKA, ET AL., PETITIONERS

v.

OMAHA TRIBE OF NEBRASKA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

1. The Omaha Tribe of Nebraska, its tribal council and its membership, represented by the United States attorney, brought this action seeking a declaratory judgment and an injunction prohibiting certain village, county, and state officials in Nebraska from attempting to exercise criminal jurisdiction within the Tribe's reservation except as to traffic offenses. The facts are fully set forth in the opinions of the district court (Pet. App. 21–51) and the court of appeals (Pet. App. 17–20), on which we primarily rely. Essentially, in 1953, Public Law 280, 67 Stat. 588, conferred on Nebraska civil and criminal jurisdiction to the extent provided by that statute over all

490-677—72——1

Omahas. It rejected the State's argument that the failure of Nebraska's legislature to present to the Governor the 1969 retrocession resolution nullified the retrocession (Pet. App. 32–39). The court further held that the Secretary acted properly when he accepted a retrocession only as to the Omaha Tribe which consented to the retrocession (Pet. App. 39–46). The court also rejected the State's argument that it had jurisdiction over the Reservation under the Land Allotment Act of 1882, 22 Stat. 341, independent of the grant to it and its subsequent retrocession of jurisdiction under Public Law 280. The court pointed out that that Act granted no jurisdiction over the Omaha Reservation to the State until all land in the Reservation had been alloted and patented to the allotees, which has never occurred (Pet. App. 48). The court of appeals affirmed in a *per curiam* opinion (Pet. App. 17–20).

2. In its petition in this Court the State has apparently abandoned its argument that its 1969 retrocession resolution was invalid. The State now argues only that the United States was not free under that resolution to accept jurisdiction over the Omaha Reservation while rejecting it over the Winnebago Reservation (Pet. 13–14). The resolution, however, contained no such limiting stipulation (Pet. App. 112–114). And the Nebraska Legislative Council, authorized by the resolution to implement it, expressly accepted federal assumption of jurisdiction over the Omaha Reservation alone (Pet. App. 27–28, 53–54). Moreover, since the principal purpose of this part of the 1968 amendment to Public Law 280 is to assure

that Indian wishes are taken into account in changes of jurisdiction over their land, it was appropriate for the United States, in its trust responsibility to the Omaha and Winnebago Tribes, to accept the retrocession as to the Omahas, who approved it, but not as to the Winnebagos, who expressed their desire to remain under state jurisdiction. Nothing in 25 U.S.C. 1323 requires the United States to accept a retrocession against the wishes of a Tribe, and nothing in the State's resolution conditioned the retrocession of jurisdiction over one Tribe on the government's acceptance of jurisdiction over the other.

3. Petitioner argues (Pet. 11–13) that this Court should grant certiorari to end the "confusion" that exists because a different result was reached by the Nebraska Supreme Court in *State* v. *Goham,* 187 Neb. 35, 187 N.W. 2d 305 (Pet. App. 63). The courts below in the present case, however, correctly held that the question whether the State has retroceded jurisdiction over an Indian reservation to the United States under an Act of Congress (25 U.S.C. 1323) is a question of federal law and have ruled that the retrocession is valid. Both the decision of the district court and the decision of the court of appeals in this case were entered after the state court's decision in *State* v. *Goham, supra,* and there is no reason to believe that the state courts will not accept their determination of this issue of federal law. Further review by this Court of the present case is thus unnecessary.

4. Petitioner's remaining arguments are insubstantial. Petitioner again urges that Nebraska had jurisdiction over the Omahas under the Allotment Act of

1882 independent of the jurisdiction it was ceded and retroceded under Public Law 280 as amended (Pet. 15). This contention was fully considered and rejected by the courts below (Pet. App. 19–20, 46–53), on whose opinions we rely. The argument that Congress does not have the constitutional power to legislate on whether jurisdiction over Indian reservations shall be exercised by a State is, of course, without merit. See *United States* v. *Kagama*, 118 U.S. 375.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
KENT FRIZZELL,
Assistant Attorney General.
EDMUND B. CLARK,
JACQUES B. GELIN,
Attorneys.

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